



# Tax Releases

“Tax Releases” are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those in a tax release, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment, and all references to section numbers are to the Wisconsin Statutes. (Caution: Tax releases reflect the position of the Wisconsin Department of Revenue, of laws enacted by the Wisconsin Legislature as of the date published in this Bulletin. Laws enacted after that date, new administrative rules, and court decisions may change the answers in a tax release.)

The following tax release is included:

## Sales and Use Tax

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## SALES AND USE TAX

### 1 Temporary Services

**Note:** This tax release supersedes the tax release titled “Temporary Services Furnished by a Seller’s Employees,” which was published in *Wisconsin Tax Bulletin* 141 (January 2005), pages 31-37.

**Statutes:** Section 77.51(1f), Wis. Stats., as created by 2009 Wis. Act 2, sec. 77.52(2), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28, and secs. 102.315(1)(f), 108.02(21e), and 108.02(24m), Wis. Stats. (2007-08).

**Wis. Adm. Code:** Sections Tax 11.67(2), Wis. Adm. Code (April 2000 Register), as amended by EmR0924, Tax 11.71(2), Wis. Adm. Code (April 1993 Register), as amended by EmR0924, and Tax 11.86(6), Wis. Adm. Code (May 1999 Register), as amended by EmR0924.

**Wisconsin Tax Appeals Commission Decision:** *Manpower Inc vs. Wisconsin Department of Revenue*, (August 12, 2009)

**Background:** Section 77.52(2), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28, provides that, for the privilege of selling, licensing, performing, or furnishing certain services at retail in Wisconsin to consumers or users, regardless of whether the consumer or user has the right of permanent use or less than the right of permanent use and regardless of whether the service is conditioned on continued payment from the purchaser, a tax is imposed upon all persons selling, performing, or furnishing the services at the rate of 5% of the sales price from the sale, license, performance or furnishing of the services.

Services subject to Wisconsin sales and use tax include the following (this list is not all-inclusive):

- Recording telecommunications messages and transmitting them to the purchaser of the service or at that purchaser’s direction, but not including those services if they are merely an incidental, as defined in sec. 77.51(5), Wis. Stats. (2007-08), as amended by 2009 Wis. Act 2, element of another service that is sold to that purchaser and is not taxable under the sales and use tax law. Sec. 77.52(2)(a)5m., Wis. Stats. (2007-08), as amended by 2009 Wis. Act 2.
- The repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property, and items, property, and goods under sec. 77.52(1)(b), (c), and (d), Wis. Stats., (i.e., certain coins and stamps, certain leased property and certain digital goods), unless:
  - When installed or applied, the installation or application of the tangible personal property or items, property, or goods will constitute an addition or capital improvement of real property.
  - At the time of such repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, or maintenance, a sale in Wisconsin of the type of property, item, or good repaired, serviced, altered, fitted, cleaned, painted, coated, towed, inspected, or maintained would have been exempt to the customer from sales taxation, for reasons other than the exemption provided in sec. 77.54(5)(a), Wis. Stats.

(2007-08) (exemption for certain sales of motor vehicles to nonresidents), and other than sales that are nontaxable because they take place outside Wisconsin.

Sec. 77.52(2)(a)10., Wis. Stats. (2007-08), as amended by 2009 Wis. Act 28.

- Landscaping and lawn maintenance services including landscape planning and counseling, lawn and garden services such as planting, mowing, spraying, and fertilizing, and shrub and tree services. Sec. 77.52(2)(a)20., Wis. Stats. (2007-08), and sec. Tax 11.86(6), Wis. Adm. Code (May 1999 Register), as amended by EmR0924.

Section Tax 11.67(2)(c)1., Wis. Adm. Code (April 2000 Register), as renumbered and amended by EmR0924, provides that if there is a single charge for providing both taxable and nontaxable services that is not a bundled transaction, the entire charge is subject to the tax, unless it is determined by the department that another method, such as allocation or primary purpose of the transaction, more accurately reflects the tax. If the charges for taxable and nontaxable services are separately stated on an invoice, the tax applies only to the charge properly attributable to the taxable services, unless it is determined by the department that the primary purpose of the transaction method for computing the tax more accurately reflects the tax.

Section 77.51(1f), Wis. Stats., as created by 2009 Wis. Act 2, provides, in part, that “bundled transaction” means the retail sale of two or more products, not including real property and services to real property, if the products are distinct and identifiable and sold for one nonitemized price. (“Products,” for purposes of the definition of “bundled transaction,” includes services. Section 77.51(11d), Wis. Stats., as created by 2009 Wis. Act 2.)

Section 102.315(1)(f), Wis. Stats. (2007-08), provides that:

“ ‘Employee leasing company’ means a person that contracts to provide the nontemporary, ongoing employee workforce of a client under a written agreement, regardless of whether the person uses the term “professional employer organization,” “PEO,” “staff leasing company,” “registered staff leasing company,” or “employee leasing company,” or uses any other, similar name, as part of the person’s business name or to describe the person’s business. “Employee leasing company” does not include a

cooperative educational service agency. This definition applies only for the purposes of this chapter and does not apply to the use of the term in any other chapter.”

Section 108.02(21e), Wis. Stats. (2007-08), provides that:

“ ‘Professional employer organization’ means any person who contracts to provide the nontemporary, ongoing employee workforce of more than one client under a written leasing contract, the majority of whose clients are not under the same ownership, management, or control as the person other than through the terms of the contract, and who under contract and in fact:

- (a) Has the right to hire and terminate the employees who perform services for the client and to reassign the employees to other clients;
- (b) Sets the rate of pay of the employees, whether or not through negotiations and whether or not the responsibility to set the rate of pay is shared with the client;
- (c) Has the obligation to and pays the employees from its own accounts;
- (d) Has a general right of direction and control over the employees, including corporate officers, which right may be shared with the client to the degree necessary to allow the client to conduct its business, meet any fiduciary responsibility, or comply with any applicable regulatory or statutory requirements;
- (e) Assumes responsibility for the unemployment insurance coverage of the employees, files all required reports, pays all required contributions or reimbursements due on the wages of the employees, and otherwise complies with all of the provisions of this chapter that are applicable to employers on behalf of the client;
- (f) Has the obligation to establish, fund, and administer employee benefit plans for the employees; and
- (g) Provides notice of the employee leasing arrangement to the employees.”

Section 108.02(24m), Wis. Stats. (2007-08), provides:

“ ‘Temporary help company’ means an entity which contracts with a client to supply individuals to perform services for the client on a temporary basis to support or supplement the workforce of the client in situations such as personnel absences, temporary personnel shortages, and workload changes resulting from seasonal demands or special assignments or projects, and which, both under contract and in fact:

- (a) Negotiates with clients for such matters as time, place, type of work, working conditions, quality, and price of the services;
- (b) Determines assignments or reassignments of individuals to its clients, even if the individuals retain the right to refuse specific assignments;
- (c) Sets the rate of pay of the individuals, whether or not through negotiation;
- (d) Pays the individuals from its account or accounts; and
- (e) Hires and terminates individuals who perform services for the clients. “

#### **Wisconsin Tax Appeals Commission Decision in *Manpower Inc vs. Wisconsin Department of Revenue*:**

In *Manpower Inc vs. Wisconsin Department of Revenue*, (Wisconsin Tax Appeals Commission, August 12, 2009), the Commission found that the temporary help services Manpower Inc. provides to its clients are not taxable services under sec. 77.52(2), Wis. Stats. The Department of Revenue had sought to impose sales tax on Manpower for the temporary help services performed by its employees that matched any service listed in sec. 77.52(2), Wis. Stats. The Department did not appeal the Commission’s decision.

#### **How Does the *Manpower* Decision Apply to Other Sellers?**

Following are factors that may be used to determine whether a seller’s services are nontaxable temporary help services based on the *Manpower* decision.

Generally, if a person sells, licenses, performs, or furnishes any of the services listed in sec. 77.52(2), Wis. Stats. (2007-08), as amended by 2009 Wis. Acts 2 and 28, the person is liable for sales tax on its sales price from such services. **However, if a seller meets all three of the following criteria (1, 2, and 3), it is considered to be providing nontaxable temporary help services:**

1. The seller meets **any one** of the following:
  - The seller is a “temporary help company” under sec. 108.02(24m) of the Wisconsin Statutes. (see definition in the previous column);
  - The seller is an “employee leasing company” under sec. 102.315(1)(f) of the Wisconsin Statutes. (see definition on page 7); **or**
  - The seller is a “professional employer organization” under sec. 108.02(21e) of the Wisconsin Statutes (see definition on page 7).
2. The seller meets **any one** of the following:
  - The seller, based on advertising, including website statements and Yellow Pages advertisements, describes its business as a temporary help, employee leasing, professional employer organization, or staff augmentation business;
  - The seller is a member of a group or association for temporary help, employee leasing, professional employer organization, or staff augmentation businesses; **or**
  - The seller is classified under the North American Industry Classification System (NAICS), 2002 edition, under industry code 561320, as a temporary help service establishment, or under industry code 561330, as a professional employer organization.
3. The seller meets **all** of the following:
  - The seller does not provide the services its workers perform directly to customers;
  - The seller’s training of its employees is limited to generic training, not specific to the needs of any one of its clients;
  - The seller’s clients furnish the tools or equipment for workers to perform tasks;
  - The seller does not control the employees performing the tasks and does not supervise or direct the activities that its workers perform for its clients;

- The seller does not define the scope of work of its workers, and is unaware of the specific tasks performed by its workers;
- The seller does not guarantee a specific or particular result of the work performed and does not contract to provide certain outcomes or results; **and**
- The seller's workers do not perform their activities for the seller's clients at the seller's location, and the seller does not control the location where the work is performed.

**Example 1:** Company A contracts with Company B to provide workers who will perform various nontaxable services (e.g. work on a production line) and taxable services (e.g. answering phones and taking messages, performing landscaping and installing prewritten software). Company A is a member of an association for staff augmentation businesses. For purposes of contributions to unemployment insurance, Company A is a temporary help company under sec. 108.24(24m) of the Wisconsin Statutes. Company A does not provide the services its workers perform directly to any of its customers. Company A provides only generic training for its employees, does not provide tools or equipment, does not control or supervise the employees performing the tasks, does not determine the location where the work is performed, and does not guarantee a specific or particular result. Company A does not define the scope of the work performed and is unaware of the specific tasks performed. All of the services provided by Company A's employees under the contract are nontaxable temporary help services.

**Example 2:** Company C contracts with Company D to prepare payroll, administer benefit plans and perform some services to prewritten software. Company C advertises that it is a professional employer organization (PEO). For worker's compensation insurance purposes, Company C falls under the definition of "professional employer organization" provided in sec. 108.02(21e) of the Wisconsin Statutes. Company C does not provide the services its workers perform directly to any of its customers. Company C provides only generic training for its employees, does not provide tools or equipment, does not control or supervise the employees performing the tasks, does not determine the location where the work is performed, and does not guarantee a specific or particular result. Company C does not define the scope of the work performed and is unaware of the specific tasks performed. All of the services of Company C's employ-

ees under the contract are nontaxable professional employer organization services.

**Example 3:** Company E contracts with Company F to perform on-site installation of hardware and off-the-shelf software programs. Company E will provide two individuals who have earned technical certification in several hardware and software specialties. Company E is not a temporary help company under sec. 108.02(24m) of the Wisconsin Statutes or an employee leasing company under sec. 102.315(1)(f) of the Wisconsin Statutes or a professional employer organization under sec 108.02(21e) of the Wisconsin Statutes. Company E advertises as an IT Solutions Provider, belongs to several IT trade organizations and is classified under NAICS industry code 54512, computer hardware, consulting services or consultants. Company E does not provide specific training to meet the needs of Company F, furnish tools or equipment to the workers, control the employees performing the tasks, or guarantee a specific result. As Company E does not meet all of the criteria associated with providing nontaxable temporary help services (criteria 1, 2, and 3, on page 8), the services performed are not temporary help services. The amount charged by Company E for providing taxable services (installation of hardware and prewritten software) is subject to Wisconsin sales tax.

**Example 4:** Company G is a building management company. Company G hires Individual H to mow lawns at the properties that Company G owns. Company G provides Individual H with training and tools to perform his services, has the right to fire Individual H, and provides general direction and control over the mowing services furnished by Individual H. Company G is required to withhold income taxes and pay employment taxes on amounts paid to Individual H, and to furnish unemployment insurance and workers compensation benefits for Individual H. Although Individual H is performing lawn maintenance services, because Individual H is an employee of Company G, amounts paid by Company G to Individual H (wages) are not subject to Wisconsin sales tax. There is no sale of taxable services when an employee furnishes or performs services for an employer and the employee is paid wages by the employer as compensation for those services.

**Example 5:** Company I enters into a contract to provide the following on-site facility operations services at an office complex owned by Company J. Services provided by Company I include:

- Ensuring proper operation of building mechanical systems (i.e., furnaces, boilers, central air condition-



ing, water heaters, and water softeners). The services include monitoring temperature, programming changes to the mechanical system, and inspection, maintenance, and repair of the mechanical system.

- Changing light bulbs and tubes.
- Moving furniture.
- Clearing clogged plumbing pipes.
- Routine and repetitive janitorial services.
- Lawn and garden services, such as mowing, fertilizing, and trimming.
- Snowplowing, sanding, and salting parking lots and sidewalks.

Company I will set the schedule the employees will work. Company J will pay Company I on a monthly basis. Company I will prioritize and assign the tasks that must be performed as outlined in its contract with Company J. Company I will also supply tools, parts, and supplies necessary to perform the services.

The portion of the monthly charge by Company I to Company J for the following services is subject to Wisconsin sales tax under sec. 77.52(2), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28:

- Inspection, maintenance, and repair of furnaces, boilers, central air conditioning, water heaters, and water softeners.
- Lawn and garden services, such as mowing, fertilizing, and trimming.
- Changing light bulbs and tubes.

The portion of the monthly charge for the following services is not subject to tax under sec. 77.52(2), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28:

- Monitoring building temperature for purposes of making programming changes to the mechanical system that adjust temperature and air flow.
- Moving furniture.
- Clearing clogged plumbing pipes.
- Routine and repetitive janitorial services.

- Snowplowing, sanding, and salting parking lots and sidewalks.

**Note:** The transaction between Company I and Company J is not a “bundled transaction,” under sec. 77.51(1f), Wis. Stats. (2007-08), as created by 2009 Wis. Act 2, because it includes services to real property. For information about bundled transactions, see sec. Tax 11.985, Wis. Adm. Code, as created by EmR0924.

Company I may determine the portion of its lump sum charge to Company J that is subject to tax based on time spent by its employees doing the various activities as evidenced by time reports. Other reasonable methods of determining the tax treatment are also acceptable. For example:

- Alternative 1 – Primary Nature of Services Performed for Job Description

When Company I assigns employees to perform services for its customer, the employees do not keep detailed records of the activities furnished to the customer or the time spent doing specific activities. However, Company I does know that:

- Its maintenance engineer is responsible for monitoring building temperature and programming changes to the mechanical system, which are nontaxable services. The maintenance engineer may perform some of the taxable activities that would normally be performed by the heating, cooling and plumbing professionals, but the amount of that type of work is small and would not be known by Company I.
- Its outdoor general laborer will furnish lawn and garden services in the spring, summer, and fall, which are taxable services, and snowplowing, sanding, and salting services in the winter, which are nontaxable services. This general laborer may perform other incidental activities for Company I, which may be taxable or not taxable, and which are not known to Company I.
- Its indoor general laborer will perform routine and repetitive janitorial services, move furniture, and change light bulbs and tubes.
- Its heating, cooling, and plumbing professional will inspect, maintain, and repair furnaces, boilers, central air conditioning systems, water heaters, and water softeners and occasionally unclog plumbing pipes. The professional may

also be asked in very limited instances to assist contractors who have been hired by Company J to install or replace heating and cooling equipment.

Since Company I does not maintain any detail that would allow it to allocate its charges for services furnished to Company J based on the time spent doing each of the services furnished, it is acceptable for Company I to collect and remit sales tax on the charge for services performed by employees based on the primary nature of the services performed by the employees as properly indicated in their job descriptions. Therefore, charges for services furnished by the outdoor laborer during the winter months, maintenance engineer, and indoor laborer are not subject to Wisconsin sales or use tax because the services the employees furnish are primarily nontaxable services. Charges for the outdoor laborer during the spring, summer, and fall months and the heating, cooling, and plumbing professional are taxable because the services these employees furnish are primarily taxable services.

- Alternative 2 – Time Spent on Specific Activities

When Company I assigns employees, it requires that its employees keep a log or time sheet that indicates specific activities they completed for Company J and the time spent doing the specific activities. This documentation may be used by Company I for purposes of monthly billings to Company J, performance measurements, etc. Company I may allocate its charge to Company J between taxable and nontaxable services based on the logs or time sheets completed by the employees that indicates the time spent by each employee performing the specific activities. If the heating, cooling, and plumbing professional spent 150 hours of a 184-hour month repairing furnaces, boilers, air conditioning systems, and water heaters and softeners and the remaining 34 hours helping contractors install heating and cooling equipment in making real property improvements, the portion of the charge subject to tax for the heating, cooling, and plumbing professional for the month would be determined as follows:

Hours worked during the month	184
Price per hour	\$ X 75
Monthly charge	\$ 13,800
Percentage of time performing taxable services (150 hours ÷ 184 hours)	X 82%
Amount subject to tax	<u>\$ 11,316</u>

- Alternative 3 – No Documentation for Allocation

If Company I maintains no documentation (time sheets or logs, position descriptions, etc.), that it could use to make a reasonable allocation of lump sum charges for both taxable and nontaxable services furnished to its customer, the entire charge is subject to Wisconsin sales or use tax.

**Example 6:** Company K is a retail supermarket chain. Company K is contemplating selling its business. It must make an itemization of all inventory on hand as of the end of its fiscal year. Company K does not have the staff available to itemize the inventory. It contacts Company L, an employment agency, who will provide two people (Individuals X and Y) at a charge of \$25 per hour per person to itemize the inventory.

Company K requires that Individuals X and Y itemize the inventory during the hours the store is closed to the general public, within a two-week time frame. Company K's owner determines the order in which categories of inventory will be itemized, and the reporting format. The owner will supervise the work done by Individuals X and Y. However, Company L controls the payment of their wages, provides them with unemployment insurance and other benefits, and is the employer for employment tax purposes.

It takes 80 hours each for Individuals X and Y to complete the inventory itemization. The employment agency charges Company K \$4,000 for the services performed by Individuals X and Y.

The \$4,000 charge by the employment agency to Company K is not subject to Wisconsin sales tax. Taking inventory is not a service that is subject to Wisconsin sales tax under sec. 77.52(2), Wis. Stats. (2007-08), as renumbered and amended by 2009 Wis. Acts 2 and 28.

**Example 7:** Company T owns trucks that are used to haul tangible personal property for Company O. Company T does not have any employees. Company T contracts with Company O to obtain drivers to drive Company T's trucks.

The charge by Company O to Company T is not subject to Wisconsin sales or use tax. The service of driving trucks is not a service that is subject to Wisconsin sales or use tax under sec. 77.52(2), Wis. Stats. (2007-08), as amended by 2009 Wis. Act 2.