

“Engaged in Business” Model Statute – Revisions as of April 20, 2015.

1 [DRAFTER’S NOTE: The following model definition of “retailer engaged in business”/
2 “engaged in business” is intended to be used in conjunction with the state law provision(s)
3 imposing an obligation to pay or collect and remit sales or use taxes. If the state law
4 provision imposing the obligation uses a different term—such as “vendor” or “seller” or
5 “doing business,” that term can be substituted.]

6
7 (a) Retailer engaged in business in this state.

8 “Retailer engaged in business in this state” as used in [this Article or Act imposing tax*]
9 means a retailer, whether or not authorized to do business in this state, that has a sufficient
10 connection with this state under the United States Constitution to be subject to sales and
11 use tax collection duties. “Retailer engaged in business in this state” specifically includes a
12 retailer that conducts any of the following activities in this state:

13
14 (1) Maintaining or using directly or indirectly, an office, place of distribution, sales
15 or sample room or place, warehouse or storage place, or other place of business,
16 whether through a related party, or agent, by whatever name called.

17
18 (2) Having an employee.

19
20 (3) Having a representative, agent, salesperson, independent contractor, or any
21 other person acting or operating under the authority of the retailer or a related
22 party for the purpose of selling, delivering, installing, assembling, maintaining or
23 repairing the retailer’s products, or taking orders for or otherwise establishing or
24 maintaining a market [for tangible personal property and/or taxable services sold
25 by the retailer*] in this state.

26
27 (4) Owning or leasing real or tangible personal property;
28

1 (5) Having a related party acting under an agreement with or in cooperation with
2 the retailer that:

3
4 (A) owns or leases real or tangible personal property or performs services in
5 connection with the sale or solicitation of sales of [tangible personal property
6 and/or taxable services*] on behalf of the retailer, including services to
7 design and develop tangible personal property sold by the retailer; or

8
9 (B) uses trademarks, service marks, or trade names that are the same or
10 substantially similar to those used by the retailer.

11
12 (b) Presumption.

13
14 (1) A retailer making sales at retail [of tangible personal property and/or taxable
15 services *] into this state is presumed to be engaged in business in this state if:

16
17 (A) the retailer has an agreement, directly or indirectly, with one or more
18 residents under which, for a commission or other consideration based on
19 completed sales, the resident refers potential purchasers to the retailer,
20 directly or indirectly, whether by a link on an internet website, written or
21 oral presentation, or otherwise; and

22
23 (B) the cumulative gross receipts from sales by the retailer to purchasers
24 who are referred to the retailer by all residents with such an agreement is
25 greater than \$10,000 during the immediately preceding 12 months.

26
27 (2) The presumption created by Subsection (b)(1) may be rebutted by proof that,
28 during the preceding 12 months, no resident in the state with whom the retailer has
29 an agreement engaged in any solicitation in the state on behalf of the retailer that
30 would create a sufficient connection between the retailer and the state under the
31 United States Constitution for the state to impose sales and use tax collection duties.

1 Evidence to rebut the presumption may consist of a verified written statement from
2 each resident with whom the retailer has an agreement, obtained and provided in
3 good faith, that the resident did not engage in any such solicitation or other
4 activities in this state on behalf of the retailer during the preceding 12 months.
5

6 (3) An agreement for advertising services with a person or persons in this state, to
7 be delivered on television, radio, in print, on the Internet, or by any similar medium,
8 is not an agreement described in Subsection (b)(1) above, unless the person who is
9 a party to the agreement with the retailer also directly or indirectly solicits potential
10 customers in this state for the retailer through use of flyers, newsletters, telephone
11 calls, electronic mail, blogs, microblogs, social networking sites, or other means of
12 direct or indirect solicitation specifically targeted at potential customers in this
13 state. For purposes of this subsection, an agreement for services compensated for
14 with commissions or other consideration conditioned upon completed sales in this
15 state is not an agreement for advertising services.
16

17 (4) This Subsection (b) shall apply without regard to the date the retailer and the
18 resident entered into the agreement described herein.
19

20 (5) The 12 months before the effective date of this Act are included as part of the
21 preceding 12 months for purposes of this Act.
22

23 (c) For purposes of this Section, a person is a related party to the retailer if:
24

25 (1) the person and the retailer are component members of the same controlled
26 group of corporations under section 1563 of the Internal Revenue Code;
27

28 (2) the person is related to the retailer in a manner described under the provisions
29 of section 267 of the Internal Revenue Code; or
30

1 (3) the retailer and the person are entities such as a corporation, limited liability
2 company, partnership, estate, or trust, and the shareholders, members, partners, or
3 beneficiaries of one entity own in the aggregate directly, indirectly, beneficially, or
4 constructively at least 50 percent of the profits, capital, stock, or value of the other
5 entity.

6
7 (d) If a federal statute authorizes the imposition by this state of a duty to collect sales and
8 use tax on a retailer, then that retailer shall be deemed to be a retailer engaged in business
9 in this state.

10
11 (e) The definitions in this Section are applicable only to the taxes levied under [this Article
12 or Act*].

13
14 (f) The provisions of this Section are severable. If any provision of this Section or its
15 application is held invalid, this shall not affect other provisions or applications that can be
16 given effect without the invalid provision or application.

17
18 (g) This statute applies to sales made on or after [effective date].

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20 *States can insert language within the brackets to correspond to their particular taxing
21 schema.

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