

“Engaged in Business” Model Statute – Sales Tax Option

1 Retailer engaged in business in this state.

2 (a) Every retailer engaged in business in this state and making sales of [^{tangible personal property}
3 and/or taxable services*] in this state, and not otherwise exempt under this Act, shall register
4 with the Department and remit the tax required by this Act.

5 (b) "Retailer engaged in business in this state" as used in this section means any retailer,
6 whether or not authorized to do business in this state, that has a sufficient connection
7 under the Constitution of the United States with this state to be subject to sales tax
8 collection duties. "Retailer engaged in business in this state" specifically includes, but
9 is not limited to, any of the following:

10 (1) Any retailer maintaining, occupying, or using, permanently or temporarily,
11 directly or indirectly, or through a related party, or agent, by whatever name
12 called, an office, place of distribution, sales or sample room or place, warehouse
13 or storage place, or other place of business in this state.

14 (2) Any retailer having, permanently or temporarily, any employee,
15 representative, agent, salesperson, independent contractor, or any other person
16 operating on the retailer's behalf. This includes a person operating in this state
17 under the authority of the retailer or a related party for the purpose of selling,
18 delivering, installing, assembling, performing maintenance or repair services for
19 the retailer's purchasers in this state, or the taking of orders for [^{tangible personal}
20 property and/or taxable services*] sold by the retailer, or otherwise establishing or
21 maintaining a market for the retailer's products for sale in this state.

22 (3) Any retailer owning or leasing any real or tangible personal property
23 situated in this state.

24 (4) Any retailer for whom a related party pursuant to an agreement with or in

1 cooperation with the retailer: (A) owns or leases any real or tangible personal
2 property or performs services in this state in connection with the sale of [tangible
3 personal property and/or taxable services*] in this state, including, but not limited to, services
4 to design and develop tangible personal property sold by the retailer, or the
5 solicitation of sales of tangible personal property on behalf of the retailer; or (B)
6 uses trademarks, service marks, or trade names in this state that are the same or
7 substantially similar to those used by the retailer.

8 (c)

9 (1) In addition to Subsection (b) above, a retailer is presumed to be engaged in
10 the business of making sales at retail of [tangible personal property and/or taxable services*] in
11 this state if the retailer enters into an agreement, directly or indirectly, with
12 one or more residents of this state under which the resident, for a commission
13 or other consideration based on completed sales, directly or indirectly, refers
14 potential purchasers to the retailer, whether by a link on an internet website,
15 written or oral presentation, or otherwise, and if the cumulative gross
16 receipts from sales by the retailer to purchasers in this state who are referred
17 to the retailer by all residents of this state with such an agreement with the
18 retailer is greater than \$10,000.00 during the immediately preceding 12
19 months. The presumption created by this Subsection shall not apply if the
20 retailer's total cumulative gross receipts from sales to purchasers in this state
21 do not exceed \$_____ during the twelve months immediately preceding
22 the sale. [optional: small seller exception]

23 (2) The presumption created by the operation of Subsection (c)(1) above
24 may be rebutted by proof that the resident with whom the retailer has an
25 agreement did not engage in any solicitation in the state on behalf of the
26 retailer that would be sufficiently connected with this state under the United
27 States Constitution during the same preceding 12 months. Evidence to rebut
28 the presumption may consist of verified written statements from all
29 residents with whom the retailer has an agreement stating that they did not

1 engage in any such solicitation or other activities in this state on behalf of the
2 retailer during the preceding 12 months if the statements are provided and
3 obtained in good faith.

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

15 (4) This Subsection shall apply without regard to the date the retailer and the
16 resident entered into the agreement described herein.

17 (5) The twelve months before the effective date of this Act are included as
18 part of the preceding twelve (12) months for purposes of this Subsection (c).

19 (d) For purposes of this Section, a retailer and another person are considered related
20 parties if they meet any one of the following tests:

21 (1) the retailer and one or more persons are component members of the same
22 controlled group of corporations under section 1563 of the Internal Revenue
23 Code; or

24 (2) the retailer is a related taxpayer to the other person under the provisions of
25 section 267 of the Internal Revenue Code; or

26 (3) the retailer and the other person is a corporation, limited liability
27 company, partnership, estate, or trust, and such corporation, limited liability

1 company, partnership, estate, or trust and its shareholders, members, partners,
2 or beneficiaries own in the aggregate directly, indirectly, beneficially, or
3 constructively at least 50 percent of the profits, capital, stock, or value of the
4 other entity or both entities.

5 (e) A retailer, whether or not engaged in business in this state or authorized to do
6 business in this state, shall be subject to sales tax collection duties in this state if federal
7 law permits this state to impose such duties on the retailer.

8 (f) The definitions in this Section are only applicable to the taxes [^{levied under this Act*}].

9 (g) The provisions of this Section are severable. If any provision of this Section or its
10 application is held invalid, that invalidity shall not affect other provisions or applications
11 that can be given effect without the invalid provision or application.

12 (h) This statute applies to sales made on or after [effective date].

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