From: Fatale, Michael
Sent: Wednesday, April 21, 2010 12:20 PM
To: 'lking@mtc.gov'
Cc: 'Shirley K. Sicilian'
Subject: Mobile Workforce comments

The following comments are submitted in connection with the MTC's draft Model Mobile Workforce Withholding and Individual Income Tax Statutes ("draft model statute"), which is set forth on the MTC's web site and is stated to be subject to a public hearing to be held on April 7, 2010.

My comments are with respect to section 2 of the draft model statute, which currently states:

> **(2) This section shall not apply to compensation received by:**
>
> > **(a) a person who is a professional athlete or member of a professional athletic team;**
> > **(b) a professional entertainer who performs services in the professional performing arts;**
> > **(c) a person of prominence who performs services for compensation on a per-event basis;**
> > **(d) a person who performs construction services to improve real property, predominantly on construction sites, as a laborer; or**
> >
> > **(e) a person who is identified as a key employee, without regard to ownership, for the year immediately preceding the current tax year pursuant to Section 416(i) of the Internal Revenue Code.**

In particular, my comments are with respect to section 2(e) of the draft model statute. My comments are as follows.

First, section 2(e) of the draft model statute currently references a person "who is ***identified as*** a key employee" under Internal Revenue Code ("Code") section 416(i). But it seems to me that there is no "identification" as such that takes place under this Code provision. Therefore, I think that section 2(e) of the draft model statute should merely reference a person that "***is*** a key employee" within the meaning of this Code section.

Second, also with respect to section 2(e) of the proposed model statute, I question whether this section should state not merely "without regard to ownership" but instead "without regard to ownership ***or the existence of a benefit plan***." I make this comment because the definition of a "key employee" set forth in the referenced Code section 416(i) seems to apply only in the instance of certain benefit plans. In particular, Code section 416(i)(1)(A) defines a "key employee" as follows:

> **In general -- The term "key employee" means an employee who, at any time *during the plan year*, is--**
>
> **(i) an officer of the employer having an annual compensation greater than $130,000,**
> **(ii) a 5-percent owner of the employer,**
> **(iii) a 1-percent owner of the employer having an employer compensation from the employer of more than $150,000...**

I do not purport to be an expert on the Code's benefit plan rules in general, or Code section 416 in particular, and so among other things I have no knowledge as to the breadth of what constitutes a "plan" within the meaning of Code s. 416(i). I do note that the definition set forth in Code section 416(i)(1)(A) appears to apply throughout Code section 416(i), where the tests set forth in Code section 416(i)(1)(A) are further qualified. However, nothing set forth in Code section 416(i) seems to dispense with the notion clearly indicated in Code section 416(i)(1)(A) that this Code section's definition of a "key employee" only applies in the context of certain benefit plans. In contrast, it is my general understanding that the states participating in the MTC's Model Workforce drafting effort were seeking a dollar limitation like that set forth in Code s. 461(i) that has general applicability, and that therefore would not be limited to circumstances in which a company happened to have in place a specific type of benefit plan. Therefore, I would suggest adding the reference to section 2(a) as stated above that states that this section applies irrespective as to the existence of a benefit plan.

Thank you for considering my comments.

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