To: Wood Miller, Chair  
Members of MTC Income & Franchise Tax Uniformity Subcommittee

From: Shirley Sicilian, General Counsel

Date: February 10, 2010

Subject: Draft Model Mobile Workforce Statute

At its July, 2009 meeting, the Uniformity Committee formed a small work group of five MTC states (Idaho, Colorado, Montana, New York, and California) to create a list of relevant policy choices. The work group held two teleconferences in August of 2009 and produced the questions on the attached policy checklist. The Uniformity Income & Franchise Tax Subcommittee then met, by teleconference, in September, October, and November of 2009 to answer those policy questions. Each of the Subcommittee teleconferences was well attended by state and taxpayer representatives, including the Committee on State Taxation, the American Payroll Association, and the Federation of Tax Administrators. Based on the Subcommittee’s preliminary policy choices, staff produced a model statute for the Subcommittee’s consideration at its December 2, 2009 in-person meeting. At that meeting, the Subcommittee requested a number of policy changes, which are reflected in the answers on the attached, updated policy checklist. Those policy changes were incorporated into a second draft and discussed on a January 22, 2010 teleconference.

During the January 22, 2010 teleconference, the Subcommittee requested a handful of mostly technical corrections which are reflected in the attached “clean” and “mark-up” versions of the third draft.

The Executive Committee asked that this project be expedited and our goal is to have a model available for consideration by the Commission at its July, 2010 meeting. In order to accomplish that goal, the uniformity committee would need to finalize its recommendation by March, 2010.
INDIVIDUAL INCOME TAX

- Computation of Taxable Income
  - Adjusted Gross Income from Sources Within This State.
  - Nonresident Compensation, Exclusion

(1) Compensation subject to withholding pursuant to [cite to state withholding tax], without regard to [cite to withholding tax exception (below)], that is received by a nonresident for employment duties performed in this state, shall be excluded from state source income if:
  (a) the nonresident has no other income from sources within this state for the tax year in which the compensation was received;
  (b) the nonresident is present in this state to perform employment duties for not more than 20 days during the tax year in which the compensation is received, where presence in this state for any part of a day constitutes presence for that day unless such presence is purely for purposes of transit through the state; and
  (c) the nonresident’s state of residence provides a substantially similar exclusion or does not impose an individual income tax.

(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;
  (e) a person who is a “highly compensated employee” pursuant to Section 414(q) of the Internal Revenue Code; or
  (f) a person who is identified as a key employee on any report filed for the year immediately preceding the current tax year pursuant to Section 416(i) of the Internal Revenue Code, for purposes of deferred compensation under Section 409A of the Internal Revenue Code.
(3) This section shall not prevent the operation, renewal or initiation of any agreement with another state authorized pursuant to [cite to Code section that allows reciprocity agreements].

INDIVIDUAL INCOME TAX

• Returns and Payment
  • Persons required to file returns, exception

(1) A nonresident whose only state source income is compensation that is excluded pursuant to [Cite to Nonresident Compensation, Exclusion] has no tax liability under this Act and need not file a return. Provided that when, in the judgment of the Department, such nonresident should be required to file an informational return, nothing in this section shall preclude the Department from requiring such nonresident to do so.

(2) This section is applicable to the determination of an individual income taxpayer’s filing requirement and has no application to the imposition of, or jurisdiction to impose, this or any other tax on any taxpayer.

WITHHOLDING TAX

• Withholding from Compensation, Exception

(1) No amount is required to be deducted or retained from compensation paid to a nonresident for employment duties performed in this state if such compensation is excluded from state source income pursuant to [cite to Nonresident Compensation, Exclusion], without regard to [cite to Nonresident Compensation, Exclusion, § (1)(a)].

(2) An employer that has erroneously applied the exception provided by this section solely as a result of miscalculating the number of days a nonresident employee is present in this state to perform employment duties shall not be subject to penalty imposed under [cite to withholding penalty provisions] if:
  (a) the employer relied on a regularly maintained time and attendance system that (i) requires the employee to record, on a contemporaneous basis, his or her work location each day the employee is present in a state other than (A) the state of residence, or (B) where services are considered performed for purposes of [cite to state unemployment insurance statute], and (ii) is used by the employer to allocate the employee’s wages between all taxing jurisdictions in which the employee performs duties;
  (b) the employer does not maintain a time and attendance system described in subsection (a) and relied on employee travel records that the employer requires the employee to maintain and record on a regular and contemporaneous basis; or
  (c) the employer does not maintain a time and attendance system described in subsection (a), or require the maintenance of employee records described in subsection (b), and relied on travel expense reimbursement records that the employer requires the employee to submit on a regular and contemporaneous basis.

(3) This section establishes an exception to withholding and deduction requirements and has no application to the imposition of, or jurisdiction to impose, this or any other tax on any taxpayer.
INDIVIDUAL INCOME TAX

• Computation of Taxable Income
  • Adjusted Gross Income from Sources Within This State.
  • Nonresident Compensation, Exclusion

(1) Compensation subject to withholding pursuant to [cite to state withholding tax], without regard to [cite to withholding tax exception (below)], that is received by a nonresident for employment duties performed in this state, shall be excluded from state source income if:
  (a) the nonresident has no other income from sources within this state for the tax year in which the compensation was received;
  (b) the nonresident is present in this state to perform employment duties for not more than 20 days during the tax year in which the compensation is received, where presence in this state for any part of a day constitutes presence for that day unless such presence is purely for purposes of transit through the state; and
  (c) the nonresident’s state of residence provides a substantially similar exclusion or does not impose an individual income tax.

(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;
  (e) a person who is a “highly compensated employee” pursuant to Section 414(q) of the Internal Revenue Code; or
  (f) a person who was identified as a key employee on any report filed prior to for the year immediately preceding the current tax year pursuant to Section 416(i) of the Internal Revenue Code, for purposes of deferred compensation under Section 409A of the Internal Revenue Code.

(3) This section shall not prevent the operation, renewal or initiation of any agreement with another state authorized pursuant to [cite to Code section that allows reciprocity agreements].

INDIVIDUAL INCOME TAX

• Returns and Payment
  • Persons required to file returns, exception

(1) A nonresident whose only state source income is compensation that is excluded pursuant to [Cite to Nonresident Compensation, Exclusion] has no tax liability under this Act and need not file a return. Provided that when, in the judgment of the Department, such nonresident should be required to file an informational return, nothing in this section shall preclude the Department from requiring such nonresident to do so.
(2) This section is applicable to the determination of an individual income taxpayer’s filing requirement and has no application to the imposition of, or jurisdiction to impose, this or any other tax on this or any other taxpayer.

WITHHOLDING TAX

- Withholding from Compensation, Exception

(1) No amount is required to be deducted or retained from compensation paid to a nonresident for employment duties performed in this state if such compensation is excluded from state source income pursuant to [cite to Nonresident Compensation, Exclusion], without regard to [cite to Nonresident Compensation, Exclusion, § (1)(a)].

(2) For purposes of this section, a [An employer that has erroneously applied the exception provided by this section solely as a result of miscalculating the number of days a nonresident employee is present in this state to perform employment duties shall not be subject to penalty imposed under [cite to withholding penalty provisions] if:

   (a) the employer has relied on a regularly maintained time and attendance system that (i) requires the employee to record, on a contemporaneous basis, his or her work location each day the employee is present in a state other than (A) the state of residence, or (B) where services are considered performed for purposes of [cite to state unemployment insurance statute], and (ii) is used by the employer to allocate the employee’s wages between all taxing jurisdictions in which the employee performs duties;

   (b) if the employer does not maintain a time and attendance system described in subsection (a), the employer may rely on employee travel records that the employer requires the employee to submit on a regular and contemporaneous basis; or

   (c) and if the employer does not maintain either a time and attendance system described in subsection (a) or require the maintenance of employee records described in subsection (b), the employer may rely on travel expense reimbursement records that the employer requires the employee to submit on a regular and contemporaneous basis.

(3) This section establishes an exception to withholding and deduction requirements and has no application to the imposition of, or jurisdiction to impose, this or any other tax on this or any other taxpayer.
I. Application of the Rule:

A. Should the rule address (1) the employee’s responsibility to file (i.e., the state’s exercise of jurisdiction), and thus obviate the employer’s responsibility to withhold, or (2) only the employer’s responsibility to withhold, and leave open the employee’s responsibility to file?

- A filing exemption should be provided for non-resident employees whose only connection to the state is employment related activity that falls below a certain de minimus threshold.

- Under the draft model, an employer should be relieved of responsibility to withhold wage income for an employee whose employment related activity falls below the de minimus threshold.

B. Should the rule address local, as well as state, income tax withholding?

- The draft model should address state income tax withholding, showing optional language for states that wish to include local income tax withholding under the same rule.

C. Should the rule include a reciprocity provision to encourage enactment?

- A reciprocity provision should be included

- The draft model should explicitly preserve existing reciprocity agreements.

II. Specifics of the Rule – the threshold:

A. Should the threshold be stated in terms of:

1. Time?

- The threshold should be based on time.

a. The number of days the employee is present in the state – 10, 30, 60?
The threshold time should be 20 work days.

b. How should a “day” be calculated?

i. Preponderance of a day or any part of a day?

Any part of a day should count as a day. If the employee works during a single day in more than one non-resident state, each non-resident states recognizes one day.

ii. Include travel time to, away from, and/or through, the state?

An employee is not present in a state if his or her presence is purely for purposes of transit through the state.

2. Income?

a. Only income subject to withholding or including income from other sources, such as intangibles and real property?

b. Only such income as is attributable to the state or all such income?

The draft model should not include a specific income threshold.

3. Some combination of both? (e.g., no requirement to withhold if employee is in the state for less than 10 days AND has/had wage income below $100,000/year)

The de minimus threshold should be stated in terms of time only, with an exception that would generally include high-income employees. See Policy Question II.B.

B. Exceptions?

1. Professional entertainers?

The draft model should include an exception to the de minimus time threshold for professional entertainers, including actors/actresses

2. Professional athletes?

Yes, the draft model should include an exception to the de minimus time threshold for professional athletes and members of a professional athletic team.

3. Certain public figures?

Yes, the draft model should include an exception to the de minimus time threshold for certain public figures.

4. Others?
An exception should be added to generally include categories or types of employees that could be expected to be high-income employees. Model should reference the “key employee” reports required under IRC § 416 (i), and “highly compensated employees” under IRC § 414(q).

An exception should be added for construction workers.

III. Scope of the Rule – beyond the threshold?

A. Should the rule address wage income sourcing? If so,
   1. should the wage income sourcing rule apply only for determining whether the threshold is met, OR
   2. for determining both whether the threshold is met and where the income is attributable for withholding and personal income tax purposes? If the latter, 
      a. If an employee is present in a state, but the threshold is not met, should the income that would otherwise be attributed to the state of presence be attributed instead to the state of residence or to the state that is the base of employment?
      b. Other issues?

   ➢ No.

B. Should the rule address issues of evidence?
   1. Should the rule specify which records will (or may) be relied upon (employee, employer, or both)?
   2. Other?

   ➢ Yes. A safe harbor from penalties should be provided. The safe harbor should allow the employer to rely on (1) a time and attendance system, (2) employees travel records, or (3) employee travel expense reimbursement requests – in that order.

C. Should the rule address (or explicitly state that it does not address) issues of employer nexus for either withholding or any other business tax?

   ➢ Yes.