

“Engaged in Business” Model Statute – Revisions as of April 13, 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 has sales into the state in the preceding 12 months exceeding [dollar amount
13 of small seller threshold*] and conducts any of the following activities in the this state,
14 whether on a temporary or permanent other than on a de minimis basis:

Comment [HH1]: Because this is specified here, the repetition of it in the subsections below could largely be eliminated.

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16 (1) Maintaining or using directly or indirectly, an office, place of distribution, sales
17 or sample room or place, warehouse or storage place, or other place of business ~~in~~
18 this state, whether through a related party, or agent, by whatever name called.

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20 (2) Having an employee.

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

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(3) Owning or leasing real or tangible personal property; ~~situated in this state.~~

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

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

(B) uses trademarks, service marks, or trade names ~~in this state~~ that are the same or substantially similar to those used by the retailer.

(b) Presumption.

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

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

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

1 | ~~(2) The presumption created by Subsection (b)(1) shall not apply if the retailer's~~
2 | ~~total cumulative gross receipts from sales to purchasers in this state do not exceed~~
3 | ~~[small seller exemption] during the 12 months immediately preceding the sale.~~
4 |

5 | (23) The presumption created by Subsection (b)(1) may be rebutted by proof that,
6 | during the preceding 12 months, no resident in the state with whom the retailer has
7 | an agreement engaged in any solicitation in the state on behalf of the retailer that
8 | would create a sufficient connection between the retailer and the state under the
9 | United States Constitution for the state to impose sales and use tax collection duties.
10 | Evidence to rebut the presumption may consist of a verified written statement from
11 | each resident with whom the retailer has an agreement, obtained and provided in
12 | good faith, that the resident did not engage in any such solicitation or other
13 | activities in this state on behalf of the retailer during the preceding 12 months.
14 |

15 | (34) An agreement for advertising services with a person or persons in this state, to
16 | be delivered on television, radio, in print, on the Internet, or by any similar medium,
17 | is not an agreement described in Subsection (b)(1) above, unless the person who is
18 | a party to the agreement with the retailer also directly or indirectly solicits potential
19 | customers in this state for the retailer through use of flyers, newsletters, telephone
20 | calls, electronic mail, blogs, microblogs, social networking sites, or other means of
21 | direct or indirect solicitation specifically targeted at potential customers in this
22 | state. For purposes of this subsection, an agreement for services compensated for
23 | with commissions or other consideration conditioned upon completed sales in this
24 | state is not an agreement for advertising services.
25 |

26 | (45) This Subsection (be) shall apply without regard to the date the retailer and the
27 | resident entered into the agreement described herein.
28 |

29 | (6) The 12 months before the effective date of this Act are included as part of the
30 | preceding 12 months for purposes of this Subsection (be).
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1 (c) For purposes of this Section, a person is a related party to the retailer if:

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

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

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

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15 | (d) ~~To the extent~~if a federal statute~~s~~ authorizes the imposition by this state of a duty to
16 collect sales and use tax on a retailer, then that retailer shall be deemed to be a retailer
17 engaged in business in this state.

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19 (e) The definitions in this Section are applicable only to the taxes levied under [this Article
20 | or Act*].

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

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

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

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