



MULTISTATE TAX COMMISSION

*Working Together Since 1967 to Preserve Federalism and Tax Fairness*

**To: Stephen Cordi, Chair, and Members of MTC Executive Committee**  
**From: Shirley Sicilian, General Counsel**  
**Date: March 26, 2010**  
**Subject: Model Mobile Workforce Statute – Consideration for Public Hearing**

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## **I. Procedural Background**

At its May 2009 meeting, the Executive Committee discussed the extent to which standard withholding requirements pose challenges for businesses when employees earn wage income during short visits to multiple states. These challenges have prompted some in the business community to support federal legislation H.R. 3359 and H.R. 2110, which would pre-empt states from taxing this non-resident wage income. (See H.R. 2110, attached.) The Executive Committee referred the issue to the Uniformity Committee and asked that it expedite development of a model state law to address these challenges for states that wish to do so.

The Uniformity Committee, at its July 2009 meeting, formed a small work group of five states (Idaho, Colorado, Montana, New York, and California) to create a list of relevant policy questions. The work group held two teleconferences in August of 2009 and produced a policy checklist. The Uniformity Income & Franchise Tax Subcommittee then met by teleconference in September, October, and November of 2009 to answer those questions. (See attached policy checklist.) Each of the Subcommittee teleconferences was well attended by state and taxpayer representatives, including the Council on State Taxation, the American Payroll Association, and the Federation of Tax Administrators.

Based on the Subcommittee's policy choices, staff produced a draft model statute which was discussed and further amended by the Subcommittee at in-person and teleconference meetings held December 2, 2009; January 22, 2010; March 3, 2010 and March 22, 2010. During each discussion, the Subcommittee received valuable input from the Council on State Taxation, the American Payroll Association, and other individual business representatives. On March 22, 2010 the Subcommittee voted to approve the model and the Uniformity Committee then voted to recommend it favorably to the Executive Committee for approval for public hearing. (See attached recommended model.)

## **II. Proposal Summary**

### **Basic Structure**

- ***Covers Both Employer Withholding and Employee Individual Income Tax.*** Under the model recommended by the Uniformity Committee, an employer would not be required to withhold employee's wage income for a state if the employee spent less than

a de-minimus number of work days there and did not fall into one of the exception categories. Likewise, the employee would not be required to file and pay tax on that income to the non-resident state, as long as the employee has no other income attributable to the state. The employee would, of course, be subject to tax on that income in his or her home state.

- ***Addresses Only State Tax.*** The model does not address local withholding or individual income taxes. The Subcommittee felt that should be an option for the states, but need not be included in our basic model.

- ***Reciprocity.*** The withholding and individual income exemptions are contingent on enactment of substantially similar exemptions in the non-resident employee's home state.

- ***Specific Statement on Jurisdiction to Tax.*** Both the individual income and the withholding provisions include a specific statement that the exceptions have no application to the imposition of, or jurisdiction to impose, this or any other tax on any taxpayer.

### **Specific Details**

- ***20 work-day threshold.*** The model sets 20 work days as the de-minimus threshold under which the state would not exercise its jurisdiction to require withholding or individual income tax filing. Any part of a day spent in a state counts as one day toward the threshold, even if multiple states are visited in a single 24 hours. Presence in a state purely for travel through it does not count toward the threshold.

- ***No Income Threshold.*** The model does not set an income threshold, although income level is a factor in one of the exceptions to the rule.

- ***Exceptions.*** The model provides exceptions from the exclusions for: (1) professional athletes and members of a professional athletic team, (2) professional entertainers, (3) "persons of prominence," (4) construction workers, (5) persons who are "key employees" under IRC 416(i) provisions related to deferred compensation, by virtue of the income test but not the ownership test, and whether working for a privately or publicly traded company. An employee would be considered a "key employee" for our purposes if that person is one of the 50 highest paid officers in a publicly or privately held company, and had a salary of at least \$160,000 in 2010. (The income threshold under IRC 416(i) is indexed to inflation in \$5,000 increments.)

- ***Employer Safe-Harbor from Withholding Penalties.*** A safe-harbor from penalties is provided for situations where the employer has miscalculated the number of days. The safe harbor is available where the employer has relied on (1) a time and attendance system, (2) or if no time and attendance system is available, then employees travel records, or (3) if neither a time and attendance system nor employee travel records are available, then employee travel expense reimbursement requests.



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**DRAFT MTC Model Mobile Workforce  
Withholding and Individual Income Tax Statutes**

*As Recommended by Uniformity Committee – March 22, 2010*

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**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; 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.
- (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.



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## **Model Mobile Workforce Withholding Statute**

### **Income & Franchise Tax Uniformity Subcommittee Policy Checklist showing Subcommittee Direction *As of March 22, 2010***

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#### 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. Inclusion of local income tax withholding under the same rule should be optional.**

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 persons who meet the definition of “key employee” under IRC § 416 (i), without reference to the ownership criteria, whether the employer is public or privately held.**
- **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 safeharbor 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.**

# H. R. 2110

To limit the authority of States to tax certain income of employees for employment duties performed in other States.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 27, 2009

Mr. JOHNSON of Georgia (for himself, Mr. JORDAN of Ohio, Mr. GOODLATTE, Mr. BUTTERFIELD, and Ms. FOXX) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To limit the authority of States to tax certain income of employees for employment duties performed in other States.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Mobile Workforce  
5       State Income Tax Fairness and Simplification Act”.

6       **SEC. 2. LIMITATIONS ON STATE WITHHOLDING AND TAX-**  
7                               **ATION OF EMPLOYEE INCOME.**

8       (a) **IN GENERAL.**—No part of the wages or other re-  
9       muneration earned by an employee who performs employ-



1 ment duties in more than one State shall be subject to  
2 income tax in any State other than—

3 (1) the State of the employee's residence; and

4 (2) the State within which the employee is  
5 present and performing employment duties for more  
6 than 30 days during the calendar year in which the  
7 income is earned.

8 (b) WAGES OR OTHER REMUNERATION.—Wages or  
9 other remuneration earned in any calendar year are not  
10 subject to State income tax withholding and reporting un-  
11 less the employee is subject to income tax under subsection  
12 (a). Income tax withholding and reporting under sub-  
13 section (a)(2) shall apply to wages or other remuneration  
14 earned as of the commencement date of duties in the State  
15 during the calendar year.

16 (c) OPERATING RULES.—For purposes of deter-  
17 mining an employer's State income tax withholding and  
18 information return obligations—

19 (1) an employer may rely on an employee's de-  
20 termination of the time expected to be spent by such  
21 employee in the States in which the employee will  
22 perform duties absent—

23 (A) actual knowledge of fraud by the em-  
24 ployee in making the estimate; or

1           (B) collusion between the employer and the  
2           employee to evade tax;

3           (2) if records are maintained by an employer  
4           recording the location of an employee for other busi-  
5           ness purposes, such records shall not preclude an  
6           employer's ability to rely on an employee's deter-  
7           mination as set forth in paragraph (1); and

8           (3) notwithstanding paragraph (2), if an em-  
9           ployer, at its sole discretion, maintains a time and  
10          attendance system which tracks where the employee  
11          performs duties on a daily basis, data from the time  
12          and attendance system shall be used instead of the  
13          employee's determination as set forth in paragraph  
14          (1).

15          (d) DEFINITIONS AND SPECIAL RULES.—For pur-  
16          poses of this Act:

17               (1) DAY.—

18                       (A) An employee will be considered present  
19                       and performing employment duties within a  
20                       State for a day if the employee performs the  
21                       preponderance of the employee's employment  
22                       duties within such State for such day.

23                       (B) Notwithstanding subsection (d)(1)(A),  
24                       if an employee performs material employment  
25                       duties in a resident state and one nonresident

1 state during one day, such employee will be con-  
2 sidered to have performed the preponderance of  
3 the employee's employment duties in the non-  
4 resident state for such day.

5 (C) For purposes of subsection (d)(1), the  
6 portion of the day the employee is in transit  
7 shall not apply in determining the location of  
8 an employee's performance of employment du-  
9 ties.

10 (2) EMPLOYEE.—The term “employee” shall be  
11 defined by the State in which the duties are per-  
12 formed, except that the term “employee” shall not  
13 include a professional athlete, professional enter-  
14 tainer, or certain public figures.

15 (3) PROFESSIONAL ATHLETE.—The term “pro-  
16 fessional athlete” means a person who performs  
17 services in a professional athletic event, provided  
18 that the wages or other remuneration are paid to  
19 such person for performing services in his or her ca-  
20 pacity as a professional athlete.

21 (4) PROFESSIONAL ENTERTAINER.—The term  
22 “professional entertainer” means a person who per-  
23 forms services in the professional performing arts  
24 for wages or other remuneration on a per-event  
25 basis, provided that the wages or other remuneration

1 are paid to such person for performing services in  
2 his or her capacity as a professional entertainer.

3 (5) CERTAIN PUBLIC FIGURES.—The term  
4 “certain public figures” means persons of promi-  
5 nence who perform services for wages or other remun-  
6 eration on a per-event basis, provided that the  
7 wages or other remuneration are paid to such person  
8 for services provided at a discrete event in the form  
9 of a speech, similar presentation or personal appear-  
10 ance.

11 (6) EMPLOYER.—The term “employer” has the  
12 meaning given such term in section 3401(d) of the  
13 Internal Revenue Code of 1986 (26 U.S.C. 3401(d))  
14 or shall be defined by the State in which the duties  
15 are performed.

16 (7) STATE.—The term “State” means each of  
17 the several States of the United States.

18 (8) TIME AND ATTENDANCE SYSTEM.—The  
19 term “time and attendance system” means a system  
20 where the employee is required on a contempora-  
21 neous basis to record his work location for every day  
22 worked outside of the state in which the employee’s  
23 duties are primarily performed and the employer  
24 uses this data to allocate the employee’s wages be-

1       tween all taxing jurisdictions in which the employee  
2       performs duties.

3               (9) WAGES OR OTHER REMUNERATION.—The  
4       term “wages or other remuneration” shall be defined  
5       by the State in which the employment duties are  
6       performed.

7       **SEC. 3. EFFECTIVE DATE.**

8       This Act shall be effective on January 1, 2011.

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