



MULTISTATE TAX COMMISSION

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

**To: Robynn Wilson, Chair  
Members of MTC Income & Franchise Tax Uniformity Subcommittee**

**From: Shirley Sicilian, General Counsel**

**Date: November 23, 2010**

**Subject: Model Mobile Workforce Statute**

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## **I. Summary**

At its November 16, 2010 teleconference, the Subcommittee voted to recommend to the Executive Committee that it adopt the May 24, 2010 version of the model with two amendments:

1. require an aggregated day count for employees that work for multiple affiliated employers, and
2. add language to ensure the exception for “key employees” applies to non-corporate as well as corporate employees.

The attached draft reflects those amendments. Also attached is a copy of IRC 416(i) that contains the definition of “key employee” referenced in the model.

## **II. Procedural Background**

At its July 2009 meeting, the Uniformity Committee formed a small drafting group of five states (Idaho, Colorado, Montana, New York, and California) to create a list of relevant policy questions. The drafting group held two teleconferences in August of 2009 and produced a policy question checklist. The Uniformity Income & Franchise Tax Subcommittee then met by teleconference in September, October, and November of 2009 to answer those questions. (*See* Attachment G, 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. Based on the Subcommittee’s policy choices, staff produced a draft model statute which was discussed and further amended by the Subcommittee at four in-person and teleconference meetings. On March 22, 2010, the Uniformity Committee recommended its model Mobile Workforce statute to the Executive Committee, and on April 7, 2010, the Executive Committee approved the model for public hearing. At the hearing, public comment was received from Council on State Taxation; the Massachusetts Department of Revenue; the Missouri Department of Revenue; and the Montana Department of Revenue; and Boerio & Company, CPAs. On May 18, 2010, the hearing officer submitted a report to the Executive Committee, with recommendations for changes. On May 21, the Montana

Department of Revenue provided additional comments to the Executive Committee, expressing concern with the model and recommending that the model be sent back to the Uniformity Committee.

On May 24, 2010 the Executive Committee voted to:

- (1) Adopt the hearing officer's recommendations, and
- (2) Send the revised proposal to Uniformity Committee for further consideration in light of the Montana comments.

The Uniformity Subcommittee gave further consideration to the current model at its July, 2010 in-person meetings, at which time all public testimony, the hearing officer's report, additional comments received from Montana after the hearing, and documents regarding Montana's alternative proposal, were provided to the Subcommittee. At that time, a drafting group was formed and directed to make a list summarizing the issues that have been raised and options before the Subcommittee. The drafting group consists of Phil Horwitz (CO), Brenda Gilmer (MT), and Bruce Langston (CA –FTB). A staff memorandum dated November 5, 2010 provides (in part IV) the drafting committees list of issues and options before the Subcommittee.

On November 16, 2010, the Subcommittee met by teleconference to further consider the current model and determine its recommendations to the executive committee. The Subcommittee voted to recommend the May 24, 2010 draft model statute imposing a 20-day *de minimis* rule for both withholding and individual liability, with two additional amendments:

- require an aggregated day count for employees that work for multiple affiliated employers
- add language to ensure the exception for “key employees” applies to non-corporate as well as corporate employees.

Staff was directed to draft language for these two amendments.

### **III. Recommended Draft Model**

The proposal as approved by the Uniformity Committee is in attachment A. Its basic structure is:

- ***20-day de minimis threshold for withholding and non-resident individual income tax.*** Under the model, an employer is not required to withhold a non-resident employee's wage income for a state if the employee spent less than 20 work-days there and did not fall into one of the exceptions. *Related employers are required to aggregate the day count for an employee.* Likewise, the employee is not 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.

- ***Jurisdiction retained.*** Both the individual income and the withholding provisions include an explicit statement that these exceptions have no application to the imposition of, or jurisdiction to impose, this or any other tax on any taxpayer.

- ***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, and (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 (in general, a “key employee” is a person who is one of the 50 highest paid officers – corporate or non-corporate - and had a salary of at least \$160,000( indexed to inflation)).

- ***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.

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



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**MTC Model Mobile Workforce Statute**

Showing **Recommendations** of the Hearing Officer  
Adopted by the Executive Committee  
*May 24, 2010*

And Showing **Further Recommendations** Adopted by the Uniformity Committee  
*November 16, 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 or the existence of a benefit plan, for the year immediately preceding the current tax year pursuant to Section 416(i) of the Internal Revenue Code. For purposes of applying this provision, the term "employee" shall be substituted for the term "officer" in Section 416(i)(1)(A)(i).

(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].

(4) This section creates an exclusion from non-resident compensation under certain de minimus circumstances and has no application to jurisdiction to impose this or any other tax on any taxpayer.

## **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)]. The number of days a nonresident employee is present in this state for purposes of [cite to Nonresident Compensation, Exclusion § (1)(b)] shall include all such days the nonresident employee is present and performing employment duties in the state on behalf of the employer and any other entity related to the employer.

(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.

## IRC 416(i)

### (i) Definitions

For purposes of this section—

#### (1) Key employee

##### (A) 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, or
- (iii) a 1-percent owner of the employer having an annual compensation from the employer of more than \$150,000.

For purposes of clause (i), no more than 50 employees (or, if lesser, the greater of 3 or 10 percent of the employees) shall be treated as officers. In the case of plan years beginning after December 31, 2002, the \$130,000 amount in clause (i) shall be adjusted at the same time and in the same manner as under section [415 \(d\)](#), except that the base period shall be the calendar quarter beginning July 1, 2001, and any increase under this sentence which is not a multiple of \$5,000 shall be rounded to the next lower multiple of \$5,000. Such term shall not include any officer or employee of an entity referred to in section [414 \(d\)](#) (relating to governmental plans). For purposes of determining the number of officers taken into account under clause (i), employees described in section [414 \(q\)\(5\)](#) shall be excluded.

##### (B) Percentage owners

(i) 5-percent owner For purposes of this paragraph, the term “5-percent owner” means—

(I) if the employer is a corporation, any person who owns (or is considered as owning within the meaning of section [318](#)) more than 5 percent of the outstanding stock of the corporation or stock possessing more than 5 percent of the total combined voting power of all stock of the corporation, or

(II) if the employer is not a corporation, any person who owns more than 5 percent of the capital or profits interest in the employer.

(ii) 1-percent owner For purposes of this paragraph, the term “1-percent owner” means any person who would be described in clause (i) if “1 percent” were substituted for “5 percent” each place it appears in clause (i).

(iii) Constructive ownership rules For purposes of this subparagraph—

(I) subparagraph (C) of section [318 \(a\)\(2\)](#) shall be applied by substituting “5 percent” for “50 percent”, and

(II) in the case of any employer which is not a corporation, ownership in such employer shall be determined in accordance with regulations prescribed by the Secretary which shall be based on principles similar to the principles of section [318](#) (as modified by subclause (I)).

##### (C) Aggregation rules do not apply for purposes of determining ownership in the employer

The rules of subsections (b), (c), and (m) of section [414](#) shall not apply for purposes of determining ownership in the employer.

##### (D) Compensation

For purposes of this paragraph, the term “compensation” has the meaning given such term by section [414 \(q\)\(4\)](#).

#### (2) Non-key employee

The term “non-key employee” means any employee who is not a key employee.

**(3) Self-employed individuals**

In the case of a self-employed individual described in section [401 \(c\)\(1\)](#)—

**(A)** such individual shall be treated as an employee, and

**(B)** such individual’s earned income (within the meaning of section [401 \(c\)\(2\)](#)) shall be treated as compensation.

**(4) Treatment of employees covered by collective bargaining agreements**

The requirements of subsections (b), (c), and (d) shall not apply with respect to any employee included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and 1 or more employers if there is evidence that retirement benefits were the subject of good faith bargaining between such employee representatives and such employer or employers.

**(5) Treatment of beneficiaries**

The terms “employee” and “key employee” include their beneficiaries.

**(6) Treatment of simplified employee pensions**

**(A) Treatment as defined contribution plans**

A simplified employee pension shall be treated as a defined contribution plan.

**(B) Election to have determinations based on employer contributions**

In the case of a simplified employee pension, at the election of the employer, paragraphs (1)(A)(ii) and (2)(B) of subsection (g) shall be applied by taking into account aggregate employer contributions in lieu of the aggregate of the accounts of employees.