



Mobile Workforce Legislation: An Analysis by the Multistate Tax Commission

January ____, 2021

Background

Over the past decade, business and tax practitioner groups have proposed state and federal legislation that would relieve traveling, or “mobile,” employees and their employers from income tax and withholding obligations under certain conditions. Mobile workforce legislation is generally aimed at nonresidents¹ working in a state for a limited time.

Three proposals for mobile workforce legislation are under possible consideration nationally and at the state level, starting with federal legislation that has routinely been proposed over the years that would preempt state law.² The most recent version, S. 3995, expired when the 117th Congress started on January 3, 2021.

In response to the original federal mobile workforce legislation, the Multistate Tax Commission (MTC) adopted a model statute in 2011 for recommendation to the states. Recently, after long supporting federal preemption efforts like S. 3995, the Council On State Taxation (COST) is now focusing on passing mobile workforce laws at the state level and has drafted separate legislation for that purpose.

The MTC provides this analysis of the federal, MTC, and COST proposals, including the attached chart, to assist state policymakers and stakeholders. The full text of the proposals is included below.

Analysis

Of the three legislative proposals analyzed, we believe that the MTC model most effectively reduces burdens on employers and tax departments alike, protects state revenues, and guards against fraud.

Employer withholding is essential to state income tax administration. Employers are required to withhold state income taxes from employee wages or face liability often equal to the tax that would be due from their employees. Employers generally maintain record-keeping systems tracking information such as days worked within a state and employee home-base locations for tax, regulatory, and other purposes. In addition, employers with a regular workforce in a state must report information and pay into state workers’ compensation and unemployment insurance funds.

¹ Note that none of the legislative proposals addressed here limit a state’s ability to tax *resident* “remote” workers, meaning employees who work permanently from their homes in states where the employer has no offices or other business locations. Because of the COVID-19 pandemic, many states have provided temporary relief for employers with *temporary* remote workers in their taxing jurisdictions.

² Any federal proposal that would preclude states from taxing resident employees for any reason could jeopardize the ability of states to maintain not only their personal income tax systems but also other taxes and employer requirements, and would undermine the reason personal income taxes are generally imposed: states can legally tax wages where they are earned.

Some employers without a regular workforce in a state can trigger income tax and withholding responsibilities due to a brief trip into that state by a single employee. In this circumstance, even if the employer has an adequate time and location-tracking system in place, the added administrative costs of withholding and filing will almost certainly exceed the employee's tax liability.

States and tax agencies can partially address this problem by implementing reasonable, workable laws and administrative rules. For example, some states may currently simply allow employers to correct any withholding errors by "trueing up" the proper amount of tax withheld by year-end and obtaining refunds or paying additional amounts, as necessary, without interest or late-filing penalties, provided the amounts also match the total state tax withholding per the employees' W-2s. Even when such administrative relief is not explicitly provided, it appears that state tax agencies seldom use their enforcement resources to pursue small amounts of under-withholding.

States have also provided other forms of relief by establishing reporting thresholds. Roughly half of the states currently provide a minimum days-threshold, averaging around 15 workdays, before wages are subject to income tax or withholding. Of the states that do not have a minimum days-threshold, most have a minimum dollar-threshold for the portion of wages earned while in the state, which is often tied to the state's personal exemption.

Despite these existing state remedies, some business and practitioner groups continue to advocate for Congress to preempt state law and impose a national standard. But federal legislation would simply take away the power from states to make these important tax policy determinations for themselves.

The highlighted rows in the accompanying chart identify key differences in the three proposals. For example, the COST proposal would create a 30-day threshold for most employees before wages are subject to income tax or withholding, with exceptions. The MTC proposal provides a 20-day threshold while including similar exceptions. The MTC proposal also has a high wage exception to the days-worked threshold for any employee whose total annual wages exceed an amount as determined by each legislature (the amount would generally be calculated based on prior year wages).

Perhaps more important than the days-threshold or the types of employees that are excluded is whether the employer must maintain and use proper recordkeeping to comply with the requirements. The MTC proposal generally provides relief from withholding only if the employer relies on adequate records that can be reasonably audited. And, to avoid recordkeeping disputes over how to count a "day" worked in the state, the MTC proposal establishes a simple standard of any amount worked during the day in the state.

For more information about this analysis, contact MTC Uniformity Counsel Helen Hecht at hhecht@mtc.gov.

The MTC is an intergovernmental state agency whose members are the departments of revenue throughout the United States. Our mission is to promote uniformity, assist taxpayers with compliance, and advocate for state and local sovereignty over state tax policy and administration.

MTC Model Mobile Workforce Statute³

SECTION A. 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 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.

(f) a person who is an employee of a non-corporate employer, and who would be 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, if the term "employee" were substituted for the term "officer" in Section 416(i)(I)(A)(i) and if such person is one of the non-corporate employer's 50 highest paid employees without regard to whether such person is an officer.

(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 minimis circumstances and has no application to this state's jurisdiction to impose this or any other tax on any taxpayer.

³ Original text available at:

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/Mobile%20Workforce%20resolution%202011.pdf

SECTION B. 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 this state's jurisdiction to impose, this or any other tax on any taxpayer.

SECTION C. 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, § (l)(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 related person.

(a) For purposes of this section (1), "related person" means a person that, with respect to the taxpayer during all or any portion of the taxable year, is: (1) a related entity, (2) a component member as defined in subsection (b) of section 1563 of the Code; (3) a person to or from whom there is attribution of stock ownership in accordance with subsection (e) of section 1563 of the Code; or (4) a person that, notwithstanding its form of organization, bears the same relationship to the taxpayer as a person described in (1) to (3), inclusive.

(b) For purposes of this section (1), "related entity" means (1) a stockholder who is an individual, or a member of the stockholder's family set forth in section 318 of the Code if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially or constructively, in the aggregate, at least 50 per cent of the value of the taxpayer's outstanding stock; (2) a stockholder, or a stockholder's partnership, limited liability company, estate, trust or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts and corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 per cent of the value of the taxpayer's outstanding stock; or (3) a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Code if the taxpayer owns, directly, indirectly, beneficially or constructively, at least 50 per cent of the value of the corporation's outstanding stock. The attribution rules of the Code shall apply for purposes of determining whether the ownership requirements of this definition have been met.

(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 this state's jurisdiction to impose, this or any other tax on any taxpayer.

DRAFT

Council On State Taxation Draft⁴
[New] [State Code Section]. Nonresident Withholding and Reporting Threshold

[Section 1]

(A) As used in this section:

(1) “Professional athlete” means an athlete who performs services in a professional athletic event for compensation.

(2) “Professional entertainer” means a person who performs services in the professional performing arts for compensation on a per-event basis.

(3) “Public figure” means a person of prominence who performs services at discrete events, such as speeches, public appearances, or similar events, for compensation on a per-event basis.

(4) “Qualified Production employee” means a person who performs production services of any nature directly in connection with a state qualified [film, television, or other commercial video production] for compensation, provided that the compensation paid to such person are qualified expenditures under [state’s incentive program], and that such compensation is subject to withholding as a condition to treating the compensation as a qualified production expenditure. (see Note)

(5) “Time and attendance system” means a system through which an employee is required, on a contemporaneous basis, to record the employee’s work location for every day worked outside the state where the employee’s employment duties are primarily performed and which is designed to allow the employer to allocate the employee’s compensation for income tax purposes among all states in which the employee performs employment duties for the employer.

(B) (1) Compensation, as defined under [state statute cross-reference], paid to a nonresident individual is exempt from the tax levied under [state statute cross-reference] if all of the following conditions apply:

(a) The compensation is paid for employment duties performed by the individual in this state on thirty or fewer days in the calendar year;

(b) The individual performed employment duties in more than one state during the calendar year;

(c) The compensation is not paid for employment duties performed by the individual in the individual’s capacity as a professional athlete, professional entertainer, public figure, or qualified production employee; and

(d) The nonresident individual's state of residence: i) provides a substantially similar exclusion, or ii) does not impose an individual income tax, or iii) the individual's income is exempt from taxation by this state under the United States Constitution or federal statute.

Note: A “production employee” exception is optional based on whether it is needed for a state’s film, television, or other commercial video production incentive program.

⁴ www.COST.org.

(2) Except as otherwise provided in this division, an employer is not required to withhold taxes under [state statute cross-reference] from compensation that is paid to an employee described in division (B)(1) of this section. If, during the calendar year, the number of days an employee spends performing employment duties in this state exceeds the thirty-day threshold described in division (B)(1)(a) of this section, an employer shall withhold and remit tax to this state for every day in that calendar year, including the first thirty days, on which the employee performs employment duties in this state.

(C) The [revenue department] shall not require the payment of any penalties or interest otherwise applicable for failing to deduct and withhold income taxes as required under [state statute cross-reference] if, when determining whether or not withholding was required, the employer met either of the following conditions:

(1) The employer at its sole discretion maintains a time and attendance system, and the employer relied on data from that system.

(2) The employer does not maintain a time and attendance system, and the employer relied on either (a) its own records, maintained in the regular course of business, of the employee's location or (b) the employee's reasonable determination of the time the employee expected to spend performing employment duties in this state, provided, however, that the employer did not have actual knowledge of fraud on the part of the employee in making the determination and provided that the employer and the employee did not collude to evade taxation in making the determination.

(D) For purposes of this section, an employee shall be considered present and performing employment duties within this state for a day if the employee performs more of the employee's employment duties in this state than in any other state during that day. Any portion of the day during which the employee is in transit shall not be considered in determining the location of an employee's performance of employment duties.

[Section 2]

The enactment by this act of [state code section] applies to taxable years beginning on and after January 1, 202X.

[Section 3]

If any provision of this act, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this act, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.

S. 3995 (116th Congress)⁵

A BILL

To limit the authority of States or other taxing jurisdictions to tax certain income of employees for employment duties performed in other States or taxing jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Remote and Mobile Worker Relief Act of 2020”.

SEC. 2. LIMITATIONS ON WITHHOLDING AND TAXATION OF EMPLOYEE INCOME.

(a) In General.—No part of the wages or other remuneration earned by an employee who performs employment duties in more than one taxing jurisdiction shall be subject to income tax in any taxing jurisdiction other than—

- (1) the taxing jurisdiction of the employee’s residence; and
- (2) the taxing jurisdiction within which the employee is present and performing employment duties for more than 30 days during the calendar year in which the wages or other remuneration is earned.

(b) Wages Or Other Remuneration.—Wages or other remuneration earned in any calendar year shall not be subject to income tax withholding and reporting requirements with respect to any taxing jurisdiction unless the employee is subject to income tax in such taxing jurisdiction under subsection (a). Income tax withholding and reporting requirements under subsection (a)(2) shall apply to wages or other remuneration earned as of the commencement date of employment duties in the taxing jurisdiction during the calendar year.

(c) Operating Rules.—For purposes of determining penalties related to an employer’s income tax withholding and reporting requirements with respect to any taxing jurisdiction—

- (1) an employer may rely on an employee’s annual determination of the time expected to be spent by such employee in the taxing jurisdictions in which the employee will perform duties absent—
 - (A) the employer’s actual knowledge of fraud by the employee in making the determination; or
 - (B) collusion between the employer and the employee to evade tax;
- (2) except as provided in paragraph (3), if records are maintained by an employer in the regular course of business that record the location of an employee, such records shall not preclude an employer’s ability to rely on an employee’s determination under paragraph (1); and
- (3) notwithstanding paragraph (2), if an employer, at its sole discretion, maintains a time and attendance system that tracks where the employee performs duties on a daily basis, data from the time and attendance system shall be used instead of the employee’s determination under paragraph (1).

⁵ Original text available at: <https://www.congress.gov/bill/116th-congress/senate-bill/3995/text>

(d) Definitions And Special Rules.—For purposes of this Act:

(1) DAY.—

(A) Except as provided in subparagraph (B), an employee is considered present and performing employment duties within a taxing jurisdiction for a day if the employee performs more of the employee’s employment duties within such taxing jurisdiction than in any other taxing jurisdiction during a day.

(B) If an employee performs employment duties in a resident taxing jurisdiction and in only one nonresident taxing jurisdiction during one day, such employee shall be considered to have performed more of the employee’s employment duties in the nonresident taxing jurisdiction than in the resident taxing jurisdiction for such day.

(C) For purposes of this paragraph, the portion of the day during which the employee is in transit shall not be considered in determining the location of an employee’s performance of employment duties.

(2) EMPLOYEE.—The term “employee” has the same meaning given to it by the taxing jurisdiction in which the employment duties are performed, except that the term “employee” shall not include a professional athlete, professional entertainer, qualified production employee, or certain public figures.

(3) PROFESSIONAL ATHLETE.—The term “professional athlete” means a person who performs services in a professional athletic event, provided that the wages or other remuneration are paid to such person for performing services in his or her capacity as a professional athlete.

(4) PROFESSIONAL ENTERTAINER.—The term “professional entertainer” means a person of prominence who performs services in the professional performing arts for wages or other remuneration on a per-event basis, provided that the wages or other remuneration are paid to such person for performing services in his or her capacity as a professional entertainer.

(5) QUALIFIED PRODUCTION EMPLOYEE.—The term “qualified production employee” means a person who performs production services of any nature directly in connection with a taxing jurisdiction qualified, certified or approved film, television or other commercial video production for wages or other remuneration, provided that the wages or other remuneration paid to such person are qualified production costs or expenditures under such taxing jurisdiction’s qualified, certified or approved film incentive program, and that such wages or other remuneration must be subject to withholding under such film incentive program as a condition to treating such wages or other remuneration as a qualified production cost or expenditure.

(6) CERTAIN PUBLIC FIGURES.—The term “certain public figures” means persons of prominence who perform services for wages or other remuneration on a per-event basis, provided that the wages or other remuneration are paid to such person for services provided at a discrete event, in the nature of a speech, public appearance, or similar event.

(7) EMPLOYER.—The term “employer” has the meaning given such term in section 3401(d) of the Internal Revenue Code of 1986 (26 U.S.C. 3401(d)), unless such term is defined by the taxing jurisdiction in which the employee’s employment duties are performed, in which case the taxing jurisdiction’s definition shall prevail.

(8) TAXING JURISDICTION.—The term “taxing jurisdiction” means any of the several States, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee.

(9) TIME AND ATTENDANCE SYSTEM.—The term “time and attendance system” means a system in which—

(A) the employee is required on a contemporaneous basis to record his work location for every day worked outside of the taxing jurisdiction in which the employee’s employment duties are primarily performed; and

(B) the system is designed to allow the employer to allocate the employee’s wages for income tax purposes among all taxing jurisdictions in which the employee performs employment duties for such employer.

(10) WAGES OR OTHER REMUNERATION.—The term “wages or other remuneration” may be limited by the taxing jurisdiction in which the employment duties are performed.

(e) Adjustment During Coronavirus Pandemic.—With respect to calendar year 2020, in the case of any employee who performs employment duties in any taxing jurisdiction other than the taxing jurisdiction of the employee’s residence during such year as a result of the COVID–19 public health emergency, subsection (a)(2) shall be applied by substituting “90 days” for “30 days”.

SEC. 3. STATE AND LOCAL TAX CERTAINTY.

(a) Status Of Employees During Covered Period.—Notwithstanding section 2(a)(2) or any provision of law of a taxing jurisdiction, with respect to any employee who is working remotely within such taxing jurisdiction during the covered period—

(1) except as provided under paragraph (2), any wages earned by such employee during such period shall be deemed to have been earned at the primary work location of such employee; and

(2) if an employer, at its sole discretion, maintains a system that tracks where such employee performs duties on a daily basis, wages earned by such employee may, at the election of such employer, be treated as earned at the location in which such duties were remotely performed.

(b) Status Of Businesses During Covered Period.—Notwithstanding any provision of law of a taxing jurisdiction—

(1) in the case of an out-of-state business which has any employees working remotely within such jurisdiction during the covered period, the duties performed by such employees within such jurisdiction during such period shall not be sufficient to create any nexus or establish any minimum contacts or level of presence that would otherwise subject such business to any registration, taxation, or other related requirements for businesses operating within such jurisdiction; and

(2) except as provided under subsection (a)(2), with respect to any tax imposed by such taxing jurisdiction which is determined, in whole or in part, based on net or gross receipts or income, for purposes of apportioning or sourcing such receipts or income, any duties performed by an employee of an out-of-state business while working remotely during the covered period—

(A) shall be disregarded with respect to any filing requirements for such tax; and

(B) shall be apportioned and sourced to the tax jurisdiction which includes the primary work location of such employee.

(c) Definitions.—For purposes of this section—

(1) COVERED PERIOD.—The term “covered period” means, with respect to any employee working remotely, the period—

(A) beginning on the date on which such employee began working remotely;

and

(B) ending on the earlier of—

(i) the date on which the employer allows, at the same time—

(I) such employee to return to their primary work location; and

(II) not less than 90 percent of their permanent workforce to return to such work location; or

(ii) December 31, 2020.

(2) EMPLOYEE.—The term “employee” has the same meaning given to it by the taxing jurisdiction in which the employment duties are performed.

(3) EMPLOYER.—The term “employer” has the same meaning given such term under section 2(d)(7).

(4) OUT-OF-STATE BUSINESS.—The term “out-of-state business” means, with respect to any tax jurisdiction, any business entity which, excepting any employees of such business who are working remotely within such jurisdiction during the covered period, would not otherwise be subject to any tax filing requirements under the existing law of such taxing jurisdiction.

(5) PRIMARY WORK LOCATION.—The term “primary work location” means, with respect to an employee, the address of the employer where the employee is regularly assigned to work when such employee is not working remotely during the covered period.

(6) TAXING JURISDICTION.—The term “taxing jurisdiction” has the same meaning given such term under section 2(d)(8).

(7) WAGES.—The term “wages” means all wages and other remuneration paid to an employee that are subject to tax or withholding requirements under the law of the taxing jurisdiction in which the employment duties are deemed to be performed under subsection (a) during the covered period.

(8) WORKING REMOTELY.—The term “working remotely” means the performance of duties by an employee at a location other than the primary work location of such employee at the direction of their employer due to conditions resulting from the public health emergency relating to the virus SARS-CoV-2 or coronavirus disease 2019 (referred to in this paragraph as “COVID-19”), including—

(A) to comply with any government order relating to COVID-19;

(B) to prevent the spread of COVID-19; and

(C) due to the employee or a member of the employee's family contracting COVID-19.

(d) Preservation Of Authority Of Taxing Jurisdictions.—This section shall not be construed as modifying, impairing, superseding, or authorizing the modification, impairment, or supersession of the law of any taxing jurisdiction pertaining to taxation except as expressly provided in subsections (a) through (c).

SEC. 4. EFFECTIVE DATE; APPLICABILITY.

(a) Effective Date.—This Act shall apply to calendar years beginning after December 31, 2019.

(b) Applicability.—This Act shall not apply to any tax obligation that accrues before January 1, 2020.

No.	Issue	MTC Model Act	COST Draft	S. 3995 (116th Congress)	Comment
		Model Mobile Workforce Statute Adopted July 27, 2011.	[New] [State Code Section]. Nonresident Withholding and Reporting Threshold Most recent version as of Dec. 3, 2020.	Remote and Mobile Worker Relief Act of 2020, S. 3995 (116th) Introduced June 18, 2020. (We expect the same or similar bill to be filed in the 117 th Congress.)	NOTE: In addition to the issues compared in this chart, S. 3995 contained a separate provision, Sec. 3, that would provide additional protections from state tax and registration requirements for employers that have employees working remotely within a state during a defined “covered period.” Sec. 3 would only have applied until 12/31/2020, but we expect a similar provision may be included in any future bills while the pandemic continues. This comparison excludes discussion of Sec. 3 since it is intended to be a temporary measure.
Section 1. Definitions					
1	Employee defined.	Definition in the taxing jurisdiction would apply.	Definition in the taxing jurisdiction would apply.	Sec. 2(d)(2): the definition of the taxing jurisdiction controls.	All three proposals apply only if compensation is being paid by an employer to an employee. If compensation is paid to an independent contractor, none of these proposals apply.
2	Employer defined.	Definition in the taxing jurisdiction would apply.	Definition in the taxing jurisdiction would apply.	Sec. 2(d)(7): the definition of the taxing jurisdiction controls if defined; otherwise, follow 26 U.S.C. 4301(d).	Since the MTC and COST proposals are silent on the definition of “employer,” existing state law would apply.
3	“Related person” is included in employer definition.	Yes – Sec. C(1)(a)-(b).	Not addressed.	Not addressed.	
4	Employment day defined.	Sec. A(1)(b). Any part of a day counts as a day except when the presence is purely for transit through the state.	Sec. 1(D). “[An] employee shall be considered present and performing employment duties in this state for a day if the employee performs more of the employee’s employment duties in this state than in any other state during the that day. Any portion of a day when the employee is in transit is also excluded.”	When the employee works in more than one taxing jurisdiction during the day: where an employee “performs more of the employee’s employment duties.” Sec. 2(d)(1)(A) When an employee splits time between resident and one nonresident state: entire day is allocated to the nonresident state. Sec. 2(d)(1)(B). The portion of a day spent in transit does not count towards determining an employee’s location. Sec. 2(d)(1)(C).	The COST/S. 3995 proposals diverge from the MTC proposal and could have a major impact on tax administration and the ability of states to audit. These provisions could also affect the ability of employees to easily track their time in a jurisdiction while also creating a loophole that allows employees to work for considerable amounts of time overall in a jurisdiction without ever triggering tax withholding. All three proposals exclude transit time in a state as part of any calculation.

No.	Issue	MTC Model Act	COST Draft	S. 3995 (116th Congress)	Comment
5	Time and attendance system defined.	<p>Sec. C(2)(a):</p> <p>“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;”</p>	<p>Sec. 1(A)(5):</p> <p>“‘Time and attendance system’ means a system through which an employee is required, on a contemporaneous basis, to record the employee’s work location for every day worked outside the state where the employee’s employment duties are primarily performed and which is designed to allow the employer to allocate the employee’s compensation for income tax purposes among all states in which the employee performs employment duties for the employer.”</p>	<p>Sec. 2(d)(9):</p> <p>“The term ‘time and attendance system’ means a system in which—</p> <p>(A) the employee is required on a contemporaneous basis to record his work location for every day worked outside of the taxing jurisdiction in which the employee’s employment duties are primarily performed; and</p> <p>(B) the system is designed to allow the employer to allocate the employee’s wages for income tax purposes among all taxing jurisdictions in which the employee performs employment duties for such employer.”</p>	<p>COST and S. 3995 define “time and attendance system” almost identically.</p> <p>The MTC proposal employs materially similar language.</p>
Section 2. Provisions Addressing When Personal Income Tax is Due by Employee					
6	General rule excludes from individual income tax the income earned by employees who do not work past the “days-threshold” (meaning the number of days) in the state if other requirements are also met.	Yes. Sec. A(1).	Yes. Sec. 1(B)(1).	Yes. Sec. 2(a).	
7	Personal income tax is due starting from the first day income is earned if the exclusion period days-threshold is crossed in the jurisdiction OR if the number of days in the jurisdiction is less than the threshold and other requirements are met.	The proposal is silent; assume the answer is yes under general state rules of personal income tax.	The proposal is silent; assume the answer is yes under general state rules of personal income tax.	Sec. 2(b) requires withholding for “wages or other remuneration earned as of the commencement date of employment duties in the taxing jurisdiction during the calendar year.”	<p>We understand that each proposal is based on the concept that when an employee exceeds the “exclusion period” days-threshold, the employer will have to withhold for the entire period.</p> <p>Note that state laws may allow the employer until year-end to correct withholding so that W-2s reflect the proper amounts before penalty would generally be assessed.</p>

No.	Issue	MTC Model Act	COST Draft	S. 3995 (116th Congress)	Comment
8	Tax year or calendar year is the basis for measuring the days-threshold in a jurisdiction.	Tax year. Sec. A(1)(a) and (b); Sec. A(2)(e) and (f); Sec. C(1)(a).	Calendar year. Sec. 1(B)(1)(a) and (b); Sec. 1(B)(2).	Calendar year. Sec. 2(a)(2), (b), and (e); Sec. 4(a). Note: Sec. 2(e) extends the days-threshold to 90 due to the pandemic.	
9	Employee has a duty to file a return and pay tax if the employee's compensation does not qualify for exclusion, even if tax was not withheld.	Yes.	Yes.	Yes.	Although not expressly addressed, we understand that all three proposals do not change the duty of an employee to file if the employer does not withhold.
10	Number of days (days-threshold) a qualifying employee may work in the state before employee compensation will be subject to tax or withholding.	20 Sec. A(1)(b).	30 Sec. 1(B)(1)(a).	30 Sec. 2(a)(2) and (e). Note: Sec. 2(e) extends the days-threshold to 90 due to the pandemic.	Tax is due and withholding is required as of the 21 st or 31 st day. We understand that under all three proposals only workdays count; weekends and holidays do not count if no work is done on those days. All three proposals follow the general rule that if an employee works more than the stated days in the jurisdiction, then compensation is subject to tax and withholding from the first workday in the jurisdiction (see row 6).

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11	Employees who do not qualify to exclude compensation even though their work in the state does not exceed the days-threshold.	<p>Professional athlete or member of a professional athletic team – Sec. A(2)(a).</p> <p>Professional entertainer – Sec. A(2)(b).</p> <p>Person of prominence paid per-event – Sec. A(2)(c).</p> <p>Laborer who improves real property, predominantly on construction sites - Sec. A(2)(d).</p> <p>Key employee for immediately preceding tax year pursuant to IRC 416(i) without regard to benefit plan – Sec. A(2)(e).</p> <p>Employee of non-corporate employer in the immediately preceding tax year who is a 'key' employee without regard to benefit plan whose annual compensation is greater than \$130,000 under IRC 416(i)(1)(A)(i) and who is among the top 50 highest paid employees without regard to whether such person is an officer – Sec. A(2)(f).</p>	<p>“[p]ublic figures, professional athletes, professional entertainers, qualified production employees.” Sec. 1(B)(1)(c).</p> <p><u>Definitions:</u></p> <p>Professional athlete - Sec. 1(A)(1).</p> <p>Professional entertainer paid per-event - Sec. 1(A)(2).</p> <p>Public figure paid per discrete event - Sec. 1(A)(3).</p> <p>Qualified production employee – Sec. 1(A)(4) (person performs production services of any nature directly in connection with qualified T.V. or other commercial video production when his/her compensation is a qualified production cost and withholding is required as a condition of qualification).</p>	<p>“The term ‘employee’ ... shall not include a professional athlete, professional entertainer, qualified production employee, or certain public figures.” Sec. 2(d)(2). Professional athlete - Sec. 2(d)(3).</p> <p>Professional entertainer paid per-event - Sec. 2(d)(4).</p> <p>Qualified production employee - Sec. 2 (d)(5) (Person who performs production services of any nature directly in connection with qualified T.V. or other commercial video production when his/her compensation is a qualified production cost and withholding is required as a condition of qualification).</p> <p>Certain public figures paid per-event - Sec. 2(d)(6).</p>	<p>The MTC proposal adds laborers on construction sites and high-wage employees to the list of employees whose compensation is subject to tax and withholding as of the first workday regardless of how many days working in the jurisdiction.</p> <p>All three proposals expect the employer will also withhold for these employees.</p>
12	Would a state be allowed to tax compensation of an employee working at a location outside the state if the employee’s primary work location is inside the state (sometimes called the “convenience” rule).	<p>It depends.</p> <p>Sec. A(1) provides that “compensation . . . that is received by a nonresident for employment duties performed in this state, shall be excluded from state source income if [among other things] the nonresident is present in this state to perform employment duties for not more than 20 days during the tax year.” Therefore, state source income could nevertheless be defined to include work done outside the state where the employee’s primary work location is in the state.</p>	<p>Not until the days-threshold is exceeded.</p> <p>Sec. 1(B)(1): “Compensation, as defined under [state statute cross-reference], paid to a nonresident individual is exempt from the tax levied under [state statute cross-reference] if all of the following criteria apply:</p> <p>(a) The compensation is paid for employment duties performed by the individual in this state on thirty or fewer days in the calendar year;”</p> <p>COST explained their proposal to us as follows: “Our bill, if enacted, would override the convenience of employer rule for teleworkers of 30 days or less. If an employee teleworks for more than 30 days, the safe harbor would not apply and existing state laws (including the [convenience of the employer rule]) would prevail.”</p>	<p>Not until the days-threshold is exceeded.</p> <p>Sec. 2(a):</p> <p>“No part of the wages or other remuneration earned by an employee who performs employment duties in more than one taxing jurisdiction shall be subject to income tax in any taxing jurisdiction other than—</p> <p>(1) the taxing jurisdiction of the employee’s residence; and</p> <p>(2) the taxing jurisdiction within which the employee is present and performing employment duties for more than 30 days during the calendar year in which the wages or other remuneration is earned.”</p> <p>This provision would preempt states from taxing nonresident employees under the convenience rule unless the employees have been “present and performing employment duties for more than 30 days” in the state, as well.</p>	

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Section 3. Provisions Relieving Employer from Withholding and Penalty for Failing to Withhold					
13	General rule that relieves employer of requirement to withhold if the employee's compensation is excluded from tax.	Sec. C(1). An employer is not required to withhold when the employee's income is not taxed.	Sec. 1(B)(2). An employer is not required to withhold when the employee's income is not taxed.	Sec. 2(b). "Wages or other remuneration earned in any calendar year shall not be subject to income tax withholding and reporting requirements with respect to any taxing jurisdiction unless the employee is subject to income tax in such taxing jurisdiction under subsection (a)."	All three proposals exclude from personal withholding requirements the amounts that qualify if the days-threshold is not exceeded. Technically, if the employee does not owe tax, there is nothing to withhold. So even though the MTC and COST proposals say withholding "is not required" there is no basis for the employer to withhold since the employee would be exempt from tax. Each proposal relieves the employer of the 100% penalty for failure to withhold if the employer relied on certain employee information, but they differ in terms of the information that can be relied upon by the employer.
14	Employer can rely on the employee's annual estimation of the time to be spent in the state to avoid the 100% penalty for failure to withhold.	Not addressed.	Yes - provided the employer has no knowledge of an employee's fraud in making that estimate and the employee and employer do not collude together to evade tax. Sec. 1(C)(2)(b).	Yes - provided the employer has no knowledge of an employee's fraud in making that estimate and the employee and employer do not collude together to evade tax. And, the employer may rely on the employee's determination even if records are maintained by an employer in the regular course of business that record an employee's location. However, the employer must rely on any attendance system that tracks where an employee performs duties on a daily basis. Sec. 2(c).	The MTC proposal assumes the employer will always have some sort of records available to determine where an employee is working, whether for tax or other purposes, such as liability coverage, unemployment taxes, or insurance coverage. The COST and S. 3995 proposals allow employers to ignore existing documentation, which makes it difficult for states to audit compliance. They also ignore that states generally allow employers to reconcile withholding at the end of each year before any penalty applies.
15	Employer can rely on a time and attendance system to avoid the 100% penalty for failure to withhold.	Yes – Sec. C(2)(a).	Yes - provides relief whether the employer relies on the employee's annual estimate or the time and attendance system. Sec. 1(C)(1).	Yes - provides relief whether the employer relies on the employee's annual estimate or the time and attendance system. Sec. 2(c).	
16	Employer can rely on employee travel-related records to avoid the 100% penalty for failure to withhold.	Yes – if the employer does not have a time and attendance system. Sec. C(2)(b) and (c).	Yes. Sec. 1(C)(2)(a). Employer may rely on "its own records maintained in the regular course of business, of the employee's location...."	Not addressed.	

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Section 4. Other Provisions					
17	For the proposal to apply, an employee's state of residence must have a substantially similar law to the one seeking to impose the tax or does not impose an individual income tax.	Yes – Sec. A(1)(c). “the nonresident's state of residence provides a substantially similar exclusion or does not impose an individual income tax.”	Yes – Sec. 1(B)(1)(d). “The nonresident individual's state of residence: i) provides a substantially similar exclusion, or ii) does not impose an individual income tax, or iii) the individual's income is exempt from taxation by this state under the United States Constitution or federal statute.”	Not addressed. Under federal law, all states would have the same threshold.	MTC and COST require that resident state either have a substantially similar exclusion or not impose individual income tax. COST adds: or the income is not taxable under U.S. Constitution or federal statute.
18	Existing state reciprocity agreements addressed.	Yes – Sec. A(3).	Not addressed.	Not addressed.	Some states have existing agreements that allow their residents to pay income tax to their states of residence and then the states share information about and allocate the tax payments as agreed; adopting the MTC proposal would not change those agreements. Examples include agreements between Oregon and California as well as Illinois and Wisconsin.
19	Explicitly states that proposal does not affect jurisdiction over personal income tax or any other tax.	Yes – Sec. B(2).	Not addressed.	Not addressed.	We understand that none of the proposals change the longstanding general rule that employee compensation can be taxed in the jurisdiction where they are earned. And none of the proposals prohibit the taxability of the employer for any other purpose, e.g., having employees working in a state could mean the employer is responsible for collecting sales and use taxes.
20	Local tax jurisdictions subject to same provisions as states.	Not addressed.	Not addressed.	Yes - Sec. 2(d)(8).	
21	Severability of provisions addressed.	Not addressed.	Yes - Sec. 3.	Not addressed.	
22	Permits states to require a nonresident with no personal income tax due to file an information return.	Yes. Sec. B(1).	Not addressed.	Not addressed.	