



MULTISTATE TAX COMMISSION

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

To: Steve Cordi, Chair  
Members of the Executive Committee

From: Shirley Sicilian, General Counsel

Date: February 28, 2011

**Subject: Model Mobile Workforce Statute –  
Additional Uniformity Committee Recommendations**

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## **I. Introduction**

After public hearing and adoption of the hearing officer's recommendations, the Executive Committee asked the Uniformity Committee to consider the mobile workforce model statute further in light of concerns expressed by Montana. The Uniformity Committee recommends two additional changes in light of those concerns:

- (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 model is now back before the Executive Committee to consider approval of these additional changes and submission to a by-law 7 survey. A copy of the model with the Uniformity Committee's recommendations is attached (Attachment A – Clean, Attachment B – Markup).

## **II. Summary of the Model**

### **Basic Structure**

- ***Covers Both Employer Withholding and Non-resident Employee Individual Income Tax.*** Under the model recommended by the Uniformity Committee, an employer would not be required to withhold a non-resident 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.

### **Important 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. Related employers must aggregate the day count for an employee that works, or has worked, for more than one of them.
- **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.

### **III. Procedural History**

In May, 2009, the Executive Committee requested Uniformity Committee expedite development of a model state law to address the mobile workforce concerns being expressed in Congress. The Uniformity Committee met in July, 2010 and formed a small drafting group of five states (Idaho, Colorado, Montana, New York, and California) to create a list of relevant policy questions for developing the model. The drafting group held two teleconferences in August of 2009 and produced a policy question checklist. The Income & Franchise Tax Uniformity Subcommittee then met by teleconference in September, October, and November of 2009 to answer those questions. Each of the Subcommittee teleconferences was well attended by state and taxpayer representatives, including the Council on State Taxation, the American Payroll Association. A model statute was drafted based on the Subcommittee's policy choices, and was

discussed and further amended by the Subcommittee at four in-person and teleconference meetings held in December, 2009, January 2010, and March, 2010.

On March 22, 2010, the Uniformity Committee recommended a model Mobile Workforce statute to the Executive Committee. Under the proposal, an employer would not be required to withhold non-resident employee 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 wage 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.

On April 7, 2010, the Executive Committee approved the proposed model for public hearing, which was held on May 10, 2010. 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.

During its July, 2010 in-person meetings, the Uniformity Subcommittee gave further consideration to the model as amended by the Executive Committee, 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 workgroup of three states (CA, CO, and MT) was formed and directed to make a list summarizing the issues that have been raised and options before the Subcommittee. The workgroup met by teleconference and circulated drafts. On November 16, 2010, the Subcommittee met by teleconference and voted to recommend two additional 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.

In December, 2010, the Subcommittee reviewed draft language for these two amendments, made changes to them, and approved the recommended amendments. The further changes were to add a definition of "related entity," place "key employee" exemption for non-corporate entity in a separate section, and make 2 minor technical changes. The full Uniformity Committee then met and approved the amendments as recommendations to the Executive Committee.

On December 9, 2010, the Executive Committee met to consider the Uniformity Committee's additional recommendations. Upon hearing concerns from Montana Commissioner Bucks regarding the Subcommittee's procedure, the Executive Committee postponed action on this proposal until its next meeting.

The proposal is now back before the Executive Committee to consider approval for a bylaw 7 survey. The Committee may approve the proposal, with or without modifications; remand the proposal to an earlier stage of the process for further development; or reject the proposal and end the project. If the proposal is approved, it will be submitted to a bylaw 7 survey of Compact member states. The bylaw 7 survey asks whether the state would consider adopting the proposal in its jurisdiction. If a majority of Compact member states respond in the affirmative, the proposal will be submitted to a vote of the Commission in July, 2010.

## Attachment A



MULTISTATE TAX COMMISSION

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### **MTC Model Mobile Workforce Statute**

**Including Recommendations of the Hearing Officer**

**Adopted by the Executive Committee**

*May 24, 2010*

**And Including Further Recommendations of the Uniformity Subcommittee**

*December 7, 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 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)(1)(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 minimus circumstances and has no application to this state’s 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 this state’s 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 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.

## Attachment B



MULTISTATE TAX COMMISSION

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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 of the Uniformity Subcommittee to

*(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.*

*December 7, 2010*

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#### INDIVIDUAL INCOME TAX

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- **Adjusted Gross Income from Sources Within This State.**

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  - (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:
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  - (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.

(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)(1)(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.

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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;
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