



National Conference of State Legislatures

Task Force on State and Local Taxation

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Remote Work/Mobile Workforce Taxation Issues

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State Tax Issues on Remote and Temporary Nonresident Employees

- **Temporary (Traveling) Nonresident Employees**
 - In nearly half the states, nonresident employees incur a liability as of the first day in the state, and employers incur a related withholding obligation
 - Requirements apply to all employers, public and private: corporations, non-profits, unions, governments
 - Full compliance could overwhelm DOR capacity to process returns
 - Compliance and enforcement are exceedingly difficult
- **Remote (Teleworker) Employees (WFH)**
 - Describe employees working for a company virtually from a remote location, on either a full or part-time basis
 - Issues about nexus, withholding, filing requirements, and penalties are exacerbated by the pandemic

Industry Perspective

Nonresident Withholding Legislation: Broad Bipartisan Support

112th Congress: *Passed the House...*

HR 1864, by Reps. Howard Coble (R-NC) and Hank Johnson (D-GA). Passed the House on May 15, 2012 on Consent Calendar / Voice Vote.

S. 3485 introduced in Senate, by Sens. Sherrod Brown (D-OH) & Kay Bailey Hutchison (R-TX). No action.

113th Congress: *Election Year Politics...*

HR 1129: same lead sponsors; identical language; 35 cosponsors; favorable House Judiciary subcommittee hearing on April 29, 2014.

S. 1645: Sen. Sherrod Brown (D-OH) and Sen. John Thune (R-SD); both members of Senate Finance Committee; plus 15 cosponsors.

114th Congress: *Passed the House...*

S. 386: Same lead sponsors; **plus 53 cosponsors** (31 R, 22 D, 1 I). No action.

H.R. 2315, introduced by Rep. Mike Bishop (R-MI) and Hank Johnson (D-GA), plus 180 cosponsors. Passed the House on September 21, 2016 on Consent Calendar / Voice Vote.

115th Congress: *Passed the House; 62 Senate Sponsors...*

H.R. 1393: Same lead sponsors. Passed the House on June 20, 2017 on Consent Calendar / Voice Vote.

S. 540: Same lead sponsors, **plus 60 cosponsors** (35 R, 25 D, 1 I). No action.

116th Congress: *Pandemic & Election Year...*

S. 604, same lead sponsors introduced on Feb. 28, 2019, plus 37 cosponsors (19 D, 18 R, 1 I).

H.R. 4796, by Reps. Hank Johnson (D-GA) and Steve Chabot (R-OH) on October 22, 2019.

S. 3995, Same lead sponsors introduced on June 18, 20, with additional provisions for remoter worker tax relief.

S. 4318 (Sec. 403), introduced by Sen. Chuck Grassley (R-IA) as part of HEALS Act, same provisions as S. 3995.

Nonresident Withholding: Legislation

- **Mobile Workforce State Income Tax Simplification Act**
- **Major Supporters:**
 - AICPA and State CPA Associations; American Payroll Association (APA); COST; Diverse Coalition
- **Statutory Framework:**
 - No state personal income tax on:
 - “wages or other remuneration,” earned by:
 - “employee” performing “employment duties,” except by:
 - ◆ **employee’s state of residence, or**
 - ◆ **state in which employee is “present and performing employment duties” for more than 30 days**
 - No state withholding or reporting rules apply unless taxable
 - If taxable, rules apply as of commencement of employment duties

Nonresident Withholding: Legislation

(cont.)

Operating Rules:

- **Employers' duty to withhold: No penalties if:**
 - Reliance on employee's annual determination of time
 - Unless knowledge of fraud, or collusion
 - Regardless of presence of other employer records
 - If "time and attendance system" is in place (at employer's discretion), data from such system shall be used

Definitions:

- **"Day":**
 - Preponderance rule, but: if in resident state and nonresident state in same day, it counts as a nonresident day
 - "In Transit" time does not count

Nonresident Withholding: Legislation

(cont.)

Definitions (cont.):

- **“Employee”:**
 - Looks to state definition
 - Excludes athletes, entertainers, & public figures
 - May exclude “qualified production employee” for states with film tax credit programs
- **“Professional Athletes, Entertainers & Certain Public Figures”:**
 - Paid in their professional capacity
 - On a “per-event” basis
- **“Employer”:**
 - References IRC 3401(d), unless State has a definition

Nonresident Withholding: The Legislation (cont.)

Definitions (cont.):

- **“Time and Attendance System”:**
 - A system where employees are required to contemporaneously record their daily work location
 - Must be specifically designed to allow allocation of wages among several states
- **“Wages or Other Remuneration”:**
 - May be defined by states

Tax Administrator Perspective: Mobile Workforce Bill and MTC's 2011 Resolution

- MTC: 20 days; federal legislation: 30 days
- Excludes: construction services; "key employees" under IRC 416(i)(compensation > \$130,000); non-corporate employer's top 50 highest paid employees
- Provides that "related person" and "related party" are the same as the employer for purposes of the protection—in order to avoid setting up a shell company and dropping the employees into it
- Both MTC and federal legislation exempt traveling employees even if the employer has a business location and is already withholding in the state

Mobile Workforce Bill and MTC's 2011 Resolution (cont'd)

- Model includes a reciprocity provision so that states applying the protection will do it uniformly and so that there will be no “nowhere” income/withholding (assuming both states have income taxes)
- Model does not allow the employee to predict where they will be in the coming year in the way that the federal legislation does, but instead would require the employer to use a tracking system

Remote (Teleworker) Employee State Tax Issues During Pandemic

- **Extend filing & payment deadlines where taxpayer compliance is delayed or impractical due to COVID-19**
- **Waive interest & penalties for late payment/filing**
- **Eliminate manual processes for compliance**
 - Paper returns / paper checks
 - Wet signatures
 - Certified mail
 - Notary requirements
- **Provide option to continue withholding at teleworking employee's prior work location**
- **Provide a safe harbor from nexus created by presence of teleworkers**
- **Exempt from sales/use tax donated products (*e.g.*, PPE)**



Questions?