MOBILE WORKFORCE STATE INCOME TAX SIMPLIFICATION ACT OF 2013

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

ON

H.R. 1129

APRIL 29, 2014

Serial No. 113–91

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

87–665 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
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APRIL 29, 2014

MOBILE WORKFORCE STATE INCOME TAX SIMPLIFICATION ACT OF 2013

TUESDAY, APRIL 29, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:08 p.m., in room 2141, Rayburn House Office Building, the Honorable Spencer Bachus, (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Marino, Collins, Johnson, DelBene, Garcia, Jeffries, and Cicilline.

Staff Present: (Majority) Anthony Grossi, Counsel; Jaclyn Louis, Legislative Director for Rep. Marino; Ashley Lewis, Clerk; and (Minority) Norberto Salinas, Counsel.

Mr. BACHUS. Good afternoon. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

The focus of today's hearing is the Mobile Workforce State Income Tax Simplification Act of 2013. The legislation institutes straightforward, commonsense rules for when a state may tax a non-resident employee.

As the American workforce becomes increasingly mobile, there is a greater need to establish clear rules that define when employees trigger income tax liability and when employers should withhold these taxes. Without the uniform approach of a model workforce act, employees face the administrative burden of potentially filing an income tax return in every state they visit, even if only for 1 day.

According to the Federation of Tax Administrators, complying with the current system is difficult and probably impractical. The Mobile Workforce Act provides for a fair and easily administered system that ensures that states are paid the correct amount of taxes without unduly burdening our workforce. The Act's simple system revolves around establishing a 30-day threshold before state income tax liability is triggered. In other words, employees may work in a state for up to 30 days without incurring an obligation to file an income tax return in that state.

Additionally, employers are not required to withhold income taxes until the 30-day threshold is reached. After an employee works in a state beyond the threshold, the state's existing tax laws apply.

The Mobile Workforce Act strikes a careful balance between preserving states' ability to tax those who work within their borders and use their resources while ensuring that our nation's workforce is not impeded by burdensome administrative obligations. This legislation has evolved since its original introduction in 2006 to account for concerns raised by state taxing authorities. Over this time period, the threshold was shortened from 60 days to 30 days, definitions were revised, and the effective date was delayed to allow for a smooth implementation.

Furthermore, great care was taken to diminish the impact the Act would have on state revenues. An Ernst & Young study performed on substantially similar legislation last Congress found that the bill would result in a very small rise in revenue in some states and a tiny reduction in revenue in other states. In most states, the impact on revenues will be less than one-tenth of 1 percent, and in no state will it impact revenues more than seven-tenths of a percent.

Of course, what these figures do not account for is the potential increase in other tax revenue from employees traveling to their states for conferences or meetings now that the specter of incurring an income tax filing obligation no longer exists.

The Mobile Workforce Act is a bipartisan measure. It includes my predecessor, the Subcommittee Chair, Mr. Coble, and our current Ranking Member, Mr. Johnson, as its lead sponsors and advocates. The bill historically has enjoyed broad support, and identical legislation was passed by the full House by unanimous consent in 2012.

Today's witnesses undoubtedly will add to the record in support of the bill, and I look forward to hearing their testimony.

[The bill, H.R. 1129, follows:]

I

113TH CONGRESS
1ST SESSION

H. R. 1129

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

IN THE HOUSE OF REPRESENTATIVES

MARCH 13, 2013

Mr. COBLE (for himself and Mr. JOHNSON of Georgia) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

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

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 "Mobile Workforce State Income Tax Simplification Act of 2013".

SEC. 2. LIMITATIONS ON STATE 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 State shall be subject to income tax in any State other than—

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

(2) the State 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 State income tax withholding and reporting requirements unless the employee is subject to income tax in such State 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 State during the calendar year.

(c) OPERATING RULES.—For purposes of determining penalties related to an employer's State income tax withholding and reporting requirements—

(1) an employer may rely on an employee's annual determination of the time expected to be spent by such employee in the States 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).

(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 State for a day if the employee performs more of the employee's employment duties within such State than in any other State during a day.

(B) If an employee performs employment duties in a resident State and in only one non-resident State during one day, such employee shall be considered to have performed more of the employee's employment duties in the non-resident State than in the resident State 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 State in which the employment duties are performed, except that the term "employee" shall not include a professional athlete, professional entertainer, 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 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) 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.

(6) 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 State in which the employee's employment duties are performed, in which case the State's definition shall prevail.

(7) STATE.—The term "State" means any of the several States.

(8) 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 State 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 States in which the employee performs employment duties for such employer.

(9) WAGES OR OTHER REMUNERATION.—The term "wages or other remuneration" may be limited by the State in which the employment duties are performed.

SEC. 3. EFFECTIVE DATE; APPLICABILITY.

(a) EFFECTIVE DATE.—This Act shall take effect on January 1 of the 2d year that begins after the date of the enactment of this Act.

(b) APPLICABILITY.—This Act shall not apply to any tax obligation that accrues before the effective date of this Act.

○

Mr. BACHUS. At this time, I will recognize Mr. Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman. I look forward to hearing from the witnesses. I know Mr. Johnson is en route.

Mr. BACHUS. Thank you.

At this time, I will recognize the Chairman of the full Committee, Mr. Goodlatte, for an opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate your holding this hearing.

As it stands today, an employee who performs work in a non-resident state likely faces a myriad of disparate income tax laws. The complexity and variation of these state income tax laws places a significant burden on the American workforce. These burdens are most heavily felt by small businesses, which simply do not have the resources and can ill afford to focus their time on complying with over 40 different state tax regimes. Witnesses at two separate hearings before this Committee have testified that existing state income tax laws impose an undue burden on small businesses' ability to deploy workforces across state lines. Small businesses do not shoulder this burden alone. Cumbersome and complex state income tax laws also put a strain on large companies.

The Sarbanes-Oxley Act requires the management of these companies to sign off on internal controls that ensure they are in compliance with state tax laws. Further, Sarbanes-Oxley requires auditors to certify management's assessment of companies' compliance with these tax laws. Because state income tax laws are so diverse, large businesses and their auditors are required to invest a significant amount of time and money ensuring that companies have withheld correctly for each employee.

Rather than expanding their payrolls or reducing the prices of goods for consumers, companies are forced to devote their resources to complying with complicated state income tax laws. The Constitution grants Congress the authority to enact laws to protect the free flow of commerce among the states. While Congress should exercise its authority with care and caution, the problem imposed by the complex array of existing state income tax laws deserves a Federal solution.

The Mobile Workforce State Income Tax Simplification Act is a carefully crafted bill that creates a simple and easy-to-administer system for the imposition of state income tax laws. By creating a bright-line 30-day threshold to determine non-resident income tax liability, the bill ensures that employees will have a clear understanding of when they are liable for non-resident state income taxes, and employers will be able to accurately withhold these taxes.

By reducing an obvious administrative burden, the Mobile Workforce Act will allow small businesses to focus their resources on growing their operations and allow larger businesses to focus on increasing their payrolls and reducing the prices of their goods.

The Mobile Workforce Act enjoys broad bipartisan support, including from former Subcommittee Chairman Coble and current Subcommittee Ranking Member Johnson. I applaud their leadership on this issue during this and past Congresses.

I also want to thank Chairman Bachus for holding today's hearing to further develop the record supporting the Mobile Workforce

Act, and I look forward to hearing from our witnesses on this important measure.

Thank you, Mr. Chairman, and I yield back.

Mr. BACHUS. I thank you, Chairman.

At this time, we have heard from Mr. Cicilline from Rhode Island, so at this time I recognize the Ranking Member from Georgia, Mr. Johnson, who is, as we referred to, one of the lead sponsors on this bill, along with Mr. Coble.

Mr. JOHNSON. Thank you, Mr. Chairman. Let me apologize for being a tad late. Duty called elsewhere. But I want to thank you, Mr. Chairman, for bringing this bill before the Subcommittee for markup, and I also want to thank the Chairman of the full Committee for his support in this endeavor.

The Mobile Workforce State Income Tax Simplification Act is an important bipartisan bill that will help workers across the country, and it will also help small and multi-state businesses. I am very familiar with this issue. I introduced this bill when I was a freshman in the 110th Congress, and again in the 111th Congress, and I am pleased to have introduced the bill in the last two Congresses with my colleague from North Carolina, Howard Coble.

H.R. 1129 provides for a uniform and easily administrable law that will simplify the patchwork of existing inconsistent and confusing state rules. It would also reduce administrative costs to states and lessen compliance burdens on consumers.

Take my home state of Georgia for an example. If an Atlanta-based employee of a New York company travels to headquarters on a business trip once a year, that employee would be subject to New York income tax even if the annual visit only lasts a day. However, if that employee travels to Maine, her trip would only be subject to income tax if her trip lasts more than 10 days. If she travels to New Mexico on business, she would only be subject to tax if she was in the state for more than 15 days.

The bill that Chairman Coble and I have introduced would address this inequity by establishing a uniform law that would ensure the correct amount of tax is withheld and paid to the states without the undue burden of the current system. H.R. 1129 would only subject employees who perform employment duties in a nonresident state if they work in that state for more than 30 calendar days.

At a time when more and more Americans find themselves traveling for their job, this bill is a commonsense solution that helps workers who have to travel for work by simplifying their tax reporting requirements. Last Congress, this bill passed by a voice vote on the House floor. It would likely do so again today. So I urge that the Committee move this bill promptly so that it can come to the floor for a vote soon. This country's employees and businesses deserve quick action.

Thank you, Mr. Chairman, and I yield back the balance of my time.

Mr. BACHUS. I thank the Ranking Member.

We have a very distinguished panel today. I will start by first introducing our witnesses.

Maureen Riehl is the Vice President of Government Affairs for the Council of State Taxation, or COST. Ms. Riehl is COST's primary link to both state and Federal election officials and is responsible for managing the day-to-day legislative agenda for COST, including working with her colleagues at state Chambers across the country.

Prior to COST, Ms. Riehl was Vice President and Government Industrial Relations Counsel at the National Retail Federation for 12 years. She was responsible for NRF's national and multi-state strategy development and policy implementation for issues affecting retailers in the state.

Prior to joining the National Retail Federation in 1999, she held various state government relations positions for the International Franchise Association, the Grocery Manufacturers Association, and a coalition of advertising associates. She was also Legislative Policy and Constituency Affairs Director in the state legislature for members of both the Michigan House of Representatives and Michigan Senate.

She received her B.A. from Michigan State University and her J.D. from Thomas Cooley Law School.

Our next witness is Mr. Jeffrey Porter, Founder of Porter & Associates and Owner of Porter & Associates, a CPA firm in Huntington, West Virginia which concentrates on providing tax planning and business advisory services to small and medium-sized businesses and individuals.

Mr. Porter is active in the American Institute of Certified Public Accountants for over 20 years, currently serving as Chair of the Tax Executive Committee. He also has served on the Steering Committee for the American Institute of Certified Public Accountant's National Tax Conference for 20 years, and Chair of the Conference for over 10 years. He is also a member of the West Virginia Society of Certified Public Accountants.

He is a frequent lecturer and has taught tax-related continuing education classes for a number of state CPA societies, national and local firms, and the American Institute of Certified Public Accountants' National Tax Conference.

He received his B.A. from Marshall University and his Master's of Taxation from the University of Tulsa.

I welcome you.

Ms. Lori Brown is Director of Payroll at CACI International. She has over 18 years of experience in payroll tax compliance and payroll system conversions. Lori is an active member of the American Payroll Association and currently serves on the FTC Certification Board Payroll Hotline Committee National Speakers Bureau and the Certification Advisory Group. She has received citations of merit from the American Payroll Association each year since 2005.

Ms. Brown has taught certified payroll professional and fundamental payroll certification exam preparation classes since 2004 at Prince George's Community College and currently at George Mason University.

We welcome you to the Committee.

And our final witness is Mr. Patrick Carter, who was appointed Director of the Delaware Division of Revenue in May 2003. As the director, he oversees approximately 200 staff with the responsibility for the Administration, enforcement, and collection of personal and business income taxes for the State of Delaware. Prior to becoming director, Mr. Carter served as the Deputy Director of the Delaware Division of Revenue from 1994 to 2001.

Prior to joining the State of Delaware, Mr. Carter served as the Finance Director for the City of Wilmington, Delaware for 5 years, worked for J.P. Morgan Bank in Delaware, and Cooper & Lybrand in Philadelphia.

He received his B.S. from the University of Delaware and his MBA from Indiana University.

Did you come on Amtrak today?

Mr. CARTER. I did, Mr. Chairman.

Mr. BACHUS. All right, good.

Okay. Now we will go to our witnesses' statements. Each of our witness' written statement will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. But if you are 30 seconds over, we are not going to ring a bell on you.

To help you stay within the time—I never read that, so I am not going to. But there will be a yellow and red light, which is suggestive.

At this time, Ms. Riehl, we will start with you, and then Mr. Porter, Ms. Brown, and Mr. Carter.

TESTIMONY OF MAUREEN B. RIEHL, ESQ., VICE PRESIDENT, GOVERNMENT AFFAIRS, COUNCIL ON STATE TAXATION (COST), ON BEHALF OF COST AND THE MOBILE WORKFORCE COALITION

Ms. RIEHL. Thank you, Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee. Again, I am Maureen Riehl, Vice President of Government Affairs for the Council on State Taxation. COST is a D.C.-based trade association which represents about 600 of the nation's largest employers on state and local tax issues.

In addition to COST, I am also here representing the 263-member mobile workforce coalition of organizations and companies in support of H.R. 1129.

Mr. Chairman, I am going to begin by thanking Ranking Member Johnson and Mr. Howard Coble for introducing H.R. 1129, the "Mobile Workforce State Income Tax Simplification Act." I also want to thank Members of this Subcommittee who are also co-sponsors of the legislation and thank those that are considering becoming cosponsors.

I appreciate the opportunity to share with you COST and the coalition's views on this important issue, and that is addressing state personal income taxes imposed on employees who travel away from their resident states for temporary work periods and associated tax withholding obligations of their employers.

We urge adoption of H.R. 1129 for three main reasons. First, it is a widespread problem and one that Congress has addressed and fixed before.

Secondly, H.R. 1129 is a simple and timely solution to this problem.

And third, a Federal uniform standard is the appropriate and only solution to fix this problem.

The problem is widespread and growing, and one that has been fixed by Congress in the past. Thousands of employees travel each day for work, and the majority of these are temporary trips where they return to their resident state. Employees who travel outside their home state for business purposes are subjected to onerous administrative burdens both at home and certainly if they have to file in a non-resident state, and that may be true legally even if they are there for only 1 day.

The current patchwork of state laws affects employees of all kinds, those who travel for work. They could be small business employees, big business employees, utility and communications workers, retail employees, charity and non-profit employees, state employees, union employees, Federal agency and Congressional staff, and the list goes on, with very few exceptions.

Congress recognized this burden and has acted in the past to actually protect a mobile workforce, and has done so with Federal laws that are protecting for a 360-day time period officials or employees of airlines, motor carriers, railroads and military personnel. This is, of course, to ease the flow of interstate commerce and to reduce red tape for the employees of those types of companies.

Clearly, a second reason we need H.R. 1129 is that it is a simple and timely solution. It establishes a simple and predictable 30-day threshold to protect workers who travel. After 8 years of negotiation between state organizations and the business community, we have a bill here that actually hits on all of these major points. It maintains state sovereignty. A state can still decide whether they even have a personal income tax. It does not apply to professional athletes, entertainers, or public figures. It has modified the threshold day from the start when Mr. Johnson first introduced it from 60 days down to 30 days, and we have changed the definition of a non-resident day.

And there is no tax avoidance under this bill. One hundred percent of the tax that is owed is still owed to the resident state. The only question is when a portion of that would go to a non-resident state.

The third reason to pass H.R. 1129 is that a Federal uniform solution is the appropriate and only solution. Attempts by the states to self-regulate have fallen short. We worked with the Multi-State Tax Commission over several years, and they finally adopted a model statute back in 2011 that is patterned after H.R. 1129, but it has only been adopted in one state, North Dakota, and that does not even go into effect unless another state passes an identical law.

There is just simply no example in history to suggest that a voluntary state-by-state approach will work. Florida cannot pass a law that will protect its residents when they travel to the State of New York. Such legislation faces some political challenges at the state level, and at least nine states that don't have a personal income tax are particularly at risk. Absent a uniform adoption, we would just simply have a new patchwork of state laws.

Mr. Chairman, the only real question we confront here is whether this problem should be fixed state by state or fixed at the Congressional level. We believe the Congress is the right place to fix this problem, and we think H.R. 1129 is the proper solution.

I am happy to answer any questions. Thank you.

[The prepared statement of Ms. Riehl follows:]

COST
COUNCIL ON STATE TAXATION

Statement of
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Before the

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 1129
The Mobile Workforce State Income Tax Simplification Act of 2013

The Honorable Spencer Bachus, Chair

April 29, 2014

Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, I am Maureen Riehl, Vice President of Government Affairs for the Council On State Taxation, which is more commonly known as COST. I am here today on behalf of COST and the 263-member coalition of supporting organizations and companies, speaking in favor of H.R. 1129.

COST is a non-profit trade association consisting of more than 600 multistate corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and non-discriminatory state and local taxation of multi-jurisdictional business enterprises.

I would first like to thank Congressman Howard Coble and Ranking Member Johnson for introducing H.R. 1129, The Mobile Workforce State Income Tax Simplification Act of 2013. I appreciate the opportunity to share with you COST's views on the important issues this legislation addresses: personal income taxes imposed on employees who travel away from their resident states for temporary work periods and the associated tax withholding obligations of their employers.

Widespread Problem – One Congress has Recognized and Fixed Before

The problem addressed by H.R. 1129 is not a new one, and it is only growing. The problem affects employees of all kinds who travel for work: small business workers; big business employees; utility and communication workers; retail employees; charity and non-profit employees; teachers; state employees; union workers; federal agency and Congressional staff – and the list goes on, with very few exceptions. Every business day hundreds of thousands of employees across the country are sent by their employers to work in nonresident states. The vast majority of these trips are temporary in nature, whereby the employee conducts business in the nonresident state for a short period of time and then returns to his/her resident state.

States currently have varying and inconsistent standards regarding the requirements:

- for *employees* to file personal income tax returns when traveling to a nonresident state for temporary work periods; and,
- for *employers* to withhold income tax on employees who travel outside of their state of residence for temporary work periods.

Employees who travel outside of their state of residence for business purposes are subject to onerous administrative burdens because, in addition to filing federal and resident state income tax returns, they may also be legally required to file an income tax return in every other state into which they travel, *even if they are there for only one day*.

The patchwork of inconsistent state laws and rules is shown by the map and chart attached as Exhibit A to my testimony. The challenges imposed upon employees to understand these widely divergent rules, track down the appropriate nonresident state forms and actually comply with this multiplicity of state tax rules is nearly insurmountable.

So too, employers are extremely hard pressed to comply with these varying and disparate rules and provide the appropriate nonresident state withholding. As stated earlier, it is important to reiterate that this tax compliance issue affects <u>all</u> employers whose employees travel for work: it is such a burden that Congress has saw fit in the past to pass legislation to protect certain "mobile" employees, such as airline workers and military personnel, to ease the flow of interstate commerce and reduce "red tape" and other administrative burdens.[1]

There is no practical technological solution to this problem, and it creates potential conflict within the workplace. Very few employers, large or small, have the capability to integrate payroll with business operating systems to allow tracking of employees' whereabouts on a daily basis. Employers who have such capability face further challenges in attempting to use such systems to comply with the states' non-resident personal income tax withholding requirements. Employers' compliance with

[1] 49 U.S.C. 11108, Merchant mariner employees (1983); 49 U.S.C. 40116(f), Air carrier employees (1994); 49 U.S.C. 11502, Railroad employees (1995); 49 U.S.C. 14503, Motor carrier employees (1996); 50 App. U.S.C. 571, Military service members (2009).

disparate state rules is almost exclusively via manual processes. Because of the current lack of uniformity, the costs of automating such systems would be exorbitant in relation to any compliance gains to the various states. Furthermore, compliance challenges can create unproductive tensions in the workplace when employers are forced to "penalize" workers for work-related travel that results in this tax compliance obligation.

Simple Solution

The simple answer to this widespread problem is to legislate a federal threshold period for nonresident filing requirements of thirty days for temporary employee work assignments to nonresident states. **Employees working in nonresident states for thirty or fewer days would remain fully taxable in their resident state for all wages and other remuneration earned** (to the extent the resident state chooses to have a state personal income tax system). The vast majority of employees who travel outside their resident state for employment purposes would fit within this threshold period. To the extent the employee has duties in the nonresident state for an extended period exceeding the thirty day annual threshold, then the employer would have adequate information to provide accurate withholding of wages to the nonresident state, and the employee would be on notice that the state filing rules must be complied with. This uniform rule would greatly ease compliance for all employers subject to state withholding rules and would provide much greater certainty for employees in fulfilling their personal nonresident state filing obligations.

Uniform Rules are Needed Now

While states' laws addressing nonresident withholding and personal income tax liability have been on the books for many years, resolution of this issue has reached a critical stage for corporations for a number of reasons, most notably the enactment of the Sarbanes-Oxley Act of 2002. Under Section 404 of the Act, company management is required to certify that processes and procedures are in place to comply with applicable laws and regulations, including state tax rules. This rule, along with a commensurate desire by corporations to be fully compliant with all rules and requirements as part of corporate governance responsibilities, has increased the interest of business in desiring uniformity and simplicity in matters of nonresident state income and withholding laws.

Furthermore, employers have a significant interest in ensuring that employees comply with all state law taxation requirements. COST members are acutely aware of the burdens placed on their employees who travel outside their resident states for business. They have expressed a strong desire to meet their responsibilities as employers by assuring that their employees comply with these burdens. Unfortunately, the current patchwork of state rules makes it extremely difficult to comply fully, and businesses are starting to reduce employee travel in response.

A Federal Standard is the Appropriate and Only Solution

Congress is the appropriate body to create and enact a uniform, federal standard for nonresident taxation. As noted by Professor Walter Hellerstein in *State Taxation: Third Edition*, federal statutory law already "substantially limits states' power to tax the compensation of nonresident employees engaged in interstate transportation,"[2] and "this resolution avoids subjecting nonresident interstate transportation employees to the demands of the many jurisdictions in which they are constitutionally taxable and thereby removes what may legitimately be regarded as a burden on interstate commerce."[3] Professor Hellerstein cited these precedents regarding transportation employees as support for his judgment that the 2007 introduction of Mobile Workforce "would constitute an appropriate exercise of congressional power."[4] The authority of Congress to legislate in the area of nonresident taxation is long-established. In fact, a review of Congressional action in this area demonstrates that this legislation is exactly the kind of remedial action

[2] *State Taxation,* ¶ 20.05[4][c][i] Thomson Reuters 2012.
[3] *State Taxation*, ¶ 20.05[4][c][ii].
[4] *See* Testimony of Walter Hellerstein, Before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives, Nov. 1, 2007 at http://judiciary.house.gov/hearings/pdf/Hellerstein071101.pdf.

Congress should undertake to provide "a practical resolution of what can be a thorny administrative problem."[5]

This legislation would modernize the "rules of the road" for personal income tax obligations among nonresident employees and their employers. The bill enables the resident state to keep a greater percentage of tax, and nonresident states will have a reasonable, minimum trigger date of thirty days when assessing nonresident workers. The personal income tax owed by an employee to his/her home state will still equal 100%; the only difference is how soon and how much of that total will be legally due to another state.

In a limited manner, some states have resolved the issue of nonresident personal income taxation on a regional basis, typically with adjoining states through bilateral reciprocal agreements. This legislation in no way bars these regional reciprocal agreements, and states retain the right to be more generous than the proposed thirty day minimum when deciding if or when to impose obligations on temporary nonresident workers. These bilateral reciprocal agreements are helpful in discrete regional situations, but fall well short of solving a problem that is nationwide in scope.

This is an interstate commerce issue, but its proposed resolution does not harm states' rights. Conceptually, there is no barrier to the states agreeing, in concert, to adopt a single, national standard governing personal income taxes imposed on nonresidents working in a state for temporary work periods. In fact, in 2011 the Multistate Tax Commission (MTC) adopted a model statute that theoretically could provide the basis for such a national standard. Beginning in 2006, COST and other members of the coalition began working with the MTC and other state officials in an attempt to craft a "state" solution. Unfortunately, in the area of taxation, there are several historically insurmountable hurdles to achieving a simple system through voluntary state action.

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[5] *State Taxation*, ¶ 20.05[4][c][ii].

Model state legislation such as that adopted by the MTC in 2011 faces a fundamental political challenge in every state in which it might be considered: by definition, the legislation, when considered in any one state, does not benefit those employees living in the state or their employers unless and until another state enacts the same law. Even then, the model statute benefits only those employees who reside in a state that has enacted the law and who are traveling to a state that has also enacted the same law (the MTC model statute is based on reciprocity). To date, only one state (North Dakota) has adopted the MTC model, and it does not go into effect unless another state adopts the same language. Thus, for North Dakota employees who travel and their employers, there could be no simplification unless and until other states imposing a personal income tax have adopted the model statute. Furthermore, those states would have to adopt the model statute uniformly; in other words, state-to-state deviations from the model statute would significantly diminish, or completely eliminate, the benefits of the model statute. Finally, even if it were possible to achieve voluntary state action, it would require many years, and perhaps decades, to accomplish.

There is not a single example in the history of state taxation in this country to suggest that voluntary adoption by all the states of a model tax statute to promote simplification is achievable.[6] Fast-forward eight years to 2014, and the lack of adoption of the MTC model by other states speaks for itself. As a result, we believe the only way to secure a nationwide resolution of the issues is to provide a uniform and simple set of rules established under federal guidelines, such as that set forth in H.R. 1129.

[6] There are examples of tax simplification resulting from federal intervention in areas where discussion among the states was already underway. The taxation of motor fuel used by interstate motor carriers is one such example. The International Fuel Tax Agreement (IFTA) began as a voluntary state effort in 1983, and in 1984 federal legislation authorized the formation of a working group that ultimately drafted a model statute to cover fuel taxes on interstate motor carriers. By the end of 1990, eight years after the effort began, sixteen states had joined the IFTA. Uniformity, however, was only achieved after the adoption of the Intermodal Surface Transportation Efficiency Act in 1991, where Congress mandated that states join the IFTA by September 30, 1996 or risk loss of certain transportation revenues.

H.R. 1129 – Explanation of Provisions

First and foremost, H.R. 1129 provides that all wages and other remuneration paid to an employee would be subject to the income tax laws in the state of the employee's residence. In addition, under the legislation wages and other remuneration are also subject to tax in the state in which the employee is present performing duties for more than thirty days in a calendar year, and employers would be subject to commensurate withholding requirements of that nonresident state. The thirty day threshold does not apply to professional athletes, professional entertainers, or certain public figures who, because of their national prominence, are paid on a per-event basis to give speeches or similar presentations. For example, a professional football player would be subject to nonresident state personal income taxes for performance in an athletic event. As another example, a well-known author who is an employee of a speakers' organization would be subject to nonresident state income taxes for making a presentation in a state and receiving compensation based on that event. In both of these cases, their respective employers would be subject to the nonresident state withholding requirements.

An employer may rely on an employee's determination of the time spent in a nonresident state absent knowledge of employee fraud or collusion between the employer and employee. If an employer, however, at its discretion, maintains a time and attendance system specifically designed to track and allocate where employees perform their services for tax purposes, such system must be used instead of the employee's determination.

An employee will be considered present performing duties in a state if the employee performs the preponderance of his or her duties in such state for such day. If an employee performs employment duties in only the employee's resident state and one nonresident state during a single day, such employee will be considered to have performed the preponderance of his or her duties in the nonresident state for such day.

The terms "employee" and "wages or other remuneration" are defined by the state in which the employment duties are performed. These references to state law protect the prerogatives of the state, as the overall intention of the legislation is to make the least incursion practicable in current state withholding and personal income tax rules and regulations.

Impact on State Taxes

Employees in states with no general personal income tax[7] are burdened by the largest out of pocket costs under the current system, as they are required to pay a nonresident tax without a corresponding resident personal income tax at home. All states that levy a personal income tax provide residents with a credit for nonresident personal income taxes paid to other states up to the resident state tax rate, but for residents in states with no personal income tax, this credit does not apply to other taxes such as property or sales taxes.

For the businesses and employees in states with a personal income tax, at a macro level, the difference between the loss of tax revenue that is currently received by a state from nonresidents is generally balanced by an increase in tax revenue resulting from fewer credits provided to residents for taxes paid to other states. I have included a detailed fiscal impact on state tax receipts and a state-by-state analysis as prepared by Ernst & Young, LLP for legislation originally considered in the 111th Congress as Exhibit B to my testimony. While these numbers are pre-recession figures, with the economy still in rebound, we believe it still paints a fairly accurate picture. As noted in the fiscal impact analysis, forty-four states either gain a small amount of revenue or have net reductions in revenue of one hundredth of one percent or less (0.01%). The impact of the legislation results in a minimal redistribution of income taxes between resident and nonresident states, with only a very slight reduction in total income taxes collected by the states. For all fifty states and the District of Columbia combined, the net change is a reduction in revenue of a mere one hundredth of one percent (.01%), which accrues as a net nationwide reduction of $42 million in overall personal income taxes.

[7] Alaska; Florida; Nevada; New Hampshire; South Dakota; Tennessee; Texas; Washington State; Wyoming;

Why such a small net reduction in overall personal income taxes? Under H.R. 1129, employees whose work responsibilities in nonresident states are under the thirty day threshold period would experience a reduction in personal income taxes only under the following two circumstances: (1) to the extent the employee's resident state imposes tax at a lower rate than the nonresident state; or (2) when a nonresident state tax is imposed on an employee whose resident state does not also impose a personal income tax.

Latest Developments

During the 112th Congress, identical bipartisan legislation[8] to H.R. 1129 was passed on a voice vote by the House Judiciary Committee,[9] and again by voice vote by the full U.S. House of Representatives.[10] Likewise, identical companion legislation has also been introduced in the U.S. Senate, S. 1645, by Senator Sherrod Brown (D-OH) and Senator John Thune (R-SD), and is supported by ten bipartisan cosponsors.

The language in H.R. 1129 reflects nearly eight years of negotiation among representatives of Congress, Congressional staff, state elected and tax department officials and their affiliated groups, employers and employee organizations. From the proponent side, advocates of H.R. 1129 have steadfastly agreed to consider reasonable amendments and have discussed in good faith revisions to a national standard, resulting in at least seven substantive changes to the original version of the legislation since it was first introduced (see Exhibit C). H.R. 1129 represents a carefully crafted balance of employee, employer, and state government interests.

Conclusion

H.R. 1129 addresses a problem that is universally recognized by the state tax community. According to the Federation of Tax Administrators, "Complying with the

[8] H.R. 1864 (112th Cong., 2012)
[9] On November 17, 2011 (112th Cong., 2011)
[10] On May 15, 2012 (112th Cong., 2012)

current system is…indeed difficult and probably impractical."[11] Indeed, one prominent state tax official candidly acknowledged that even he does not comply with current law on his regular travels away from his home state, concluding that "there is widespread noncompliance" currently.[12]

The proposed solution articulated in H.R. 1129 -- a thirty day threshold period and associated operating rules that address both employee liability and employer withholding -- is widely accepted as the appropriate framework to address the problem. In fact, the MTC's model statute is based on an earlier version of H.R. 1129.[13]

Employees who travel outside of their home states for temporary work periods, and their employers, will remain subject to today's onerous burdens without Congressional action. Thus, I respectfully request your support for the speedy adoption of H.R. 1129.

I would be pleased to answer any questions you may have. Thank you.

[11] Statement of Harley Duncan before the House of Representatives Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, November 1, 2007.
[12] White, Nicola M., "Many Agreed on Need for Mobile Workforce Tax Uniformity, but Will it Happen?" *State Tax Notes*, August 2, 2010, p. 271.
[13] Multistate Tax Commission: http://www.mtc.gov/Uniformity.aspx?id=4622.

Exhibit A
Nonresident Personal Income Tax Withholding

Key
- Nonresident employees subject to tax withholding on *first day* of travel
- Nonresident employees subject to tax withholding after reaching threshold (see Appendix A for details)
- No general personal income tax (or, in the case of Washington, DC, no tax on nonresidents)

— Appendix A —

Withholding Thresholds—More than half of the states that have a personal income tax require employers to withhold tax from a nonresident employee's wages beginning with the *first day* the nonresident employee travels to the state for business purposes. Some personal income tax states (identified on the map with a yellow background) provide for a threshold before requiring tax withholding for nonresident employees. The following chart details these withholding thresholds. Please note that this chart covers *withholding* only; many of these states have a different (and usually lower) standard for imposing tax on nonresidents (*i.e.*, the employee may owe tax even where the employer is not required to withhold tax).

State	No Withholding Required If Nonresident…
Arizona	is in the state for 60 or fewer days in a calendar year
California	earns in-state wages equal to or below "Low Income Exemption Table"
Georgia	is in the state for 23 or fewer days in a calendar year or if less than $5,000 or 5% of total income is attributable to Georgia
Hawaii	is in the state for 60 or fewer days in a calendar year
Idaho	earns in-state wages less than $1,000 in a calendar year
Maine	is in the state for 10 or fewer days in a calendar year
New Jersey	earns in-state wages less than the employee's personal exemption in a calendar year
New Mexico	is in the state for 15 or fewer days in a calendar year
New York	is in the state for 14 or fewer days in a calendar year
North Dakota	is in the state for 20 or fewer days in a calendar year and is a resident of a state that provides similar protections for nonresidents (reciprocal exemption); certain occupations (e.g., professional athletes) not protected
Oklahoma	earns in-state wages less than $300 in a calendar quarter
Oregon	earns in-state wages less than the employee's standard deduction
South Carolina	earns in-state wages less than $800 in a calendar year
Utah	*employer* does business in the state for 60 of fewer days in a calendar year
Virginia	earns in-state wages less than the employee's personal exemptions and standard deduction or, if elected by the employee, the employee's filing threshold
West Virginia	earns in-state wages less than the employee's personal exemptions
Wisconsin	earns in-state wages less than $1,500 in a calendar year

Reciprocal Agreements—In addition to the thresholds shown above, many states have reciprocal agreements with neighboring states that provide that taxes are paid in (and withheld for) the resident state only. For example, a resident of Virginia who works in Maryland is subject to tax only in Virginia. The converse also applies. In most states with reciprocal agreements, a "certificate of nonresidence" must be filed either with the employer or the nonresident state. A full list of state reciprocal agreements is beyond the scope of this document.

Exhibit B

Estimates of State-by-State Impacts of H.R. 1129 / S. 1645 - the Mobile Workforce State Income Tax Simplification Act

This analysis presents state-by-state estimates of the net change in state personal income taxes projected from the impact of the Mobile Workforce State Income Tax Simplification Act, H.R. 1129 / S. 1645, at fiscal year 2008 levels. The net impact figures for each state include two components: 1) the reduction in income tax collections due to the increase in the number of instate days (30 days less a state's current-law day threshold) required before a nonresident employee is subject to income taxation, and 2) the increase in tax collections in resident states due to reduced credits on resident income tax returns for taxes paid by the residents to other states where they work and are taxed as nonresidents.

The bill has the following features that are important determinants of the estimated state income tax impacts:

- A nonresident employee, with limited exceptions, performing employment duties in a state for 30 days or less would not be subject to the nonresident state's personal income tax.

- An employee is considered to be performing employment duties within a state for a day if the preponderance of their employment duties for the day are within a state. If employment duties are performed in a nonresident state and a resident state in the same day, the employee is considered to be performing employment duties in the nonresident state for the day.

- The legislation would not be effective until January 1, 2014, at the earliest.

Table 1 provides state-by-state estimates of the change in net personal income taxes (in millions of dollars) due to the proposal. The net change for all states and the District of Columbia (-$42 million) is the sum of the revenue reduction due to reduced taxes paid by nonresident employees and increased taxes paid to resident states due to lower credits. Table 1 also reports the net change as a percent of fiscal year 2008 total state taxes.[1]

Twenty-five states have either an income tax revenue gain or no loss under the legislation; another 22 states have revenue reductions less than 0.02% (two-hundreds of a percent or two-tenths of a mill) of state tax collections. As the table illustrates, the bill redistributes income taxes between resident and nonresident states with only a very slight reduction in total income taxes collected by the states. For all states combined, the net change in total taxes is only a reduction of -.01% or $42 million, which accrues as a reduction in overall personal income taxes.

[1] The estimates were prepared by Ernst & Young LLP based on survey data provided by seventeen states through the Federation of Tax Administrators, as well as state tax collection data for other states from the U.S. Census *Governmental Finances* and state tax collection reports and journey-to-work data from the U.S. Census. More detailed estimates, as well as a description of the estimating methodology, are available upon request. The legislation will not affect local personal income taxes.

Table 1: Estimates of Impact of H.R. 1129 / S. 1645, FY 2008

State	Net Change as a Percent of Total State Taxes	Net Change in Millions of Dollars
Alabama	0.01%	$0.5
Alaska	0.00	0.0
Arizona	0.01	1.3
Arkansas	0.00	-0.3
California	-0.01	-6.2
Colorado	-0.02	-1.5
Connecticut	0.02	3.1
Delaware	0.08	2.4
District of Columbia	0.00	0.2
Florida	0.00	0.0
Georgia	-0.01	-1.8
Hawaii	0.00	0.2
Idaho	0.00	0.1
Illinois	-0.02	-7.4
Indiana	0.03	3.8
Iowa	0.01	0.9
Kansas	0.00	0.3
Kentucky	-0.01	-1.3
Louisiana	-0.02	-1.7
Maine	0.00	0.1
Maryland	-0.01	-1.0
Massachusetts	-0.03	-6.9
Michigan	-0.01	-1.8
Minnesota	-0.01	-2.2
Mississippi	0.01	0.6
Missouri	0.01	1.6
Montana	0.00	-0.1
Nebraska	0.00	-0.1
Nevada	0.00	0.0
New Hampshire	0.00	-0.1
New Jersey	0.09	26.2
New Mexico	0.00	0.0
New York	-0.07	-45.2
North Carolina	-0.01	-1.6
North Dakota	0.00	-0.1
Ohio	-0.01	-1.7
Oklahoma	-0.01	-0.5
Oregon	-0.04	-2.7
Pennsylvania	-0.01	-2.2
Rhode Island	0.12	3.3
South Carolina	0.03	2.3
South Dakota	0.00	0.0
Tennessee	0.00	-0.1
Texas	0.00	0.0
Utah	-0.01	-0.7
Vermont	0.01	0.3
Virginia	-0.01	-1.3
Washington	0.00	0.0
West Virginia	-0.01	-0.4
Wisconsin	0.00	-0.4
Wyoming	0.00	0.0
Total for All States	**-0.01%**	**-$42.0**

Exhibit C

Mobile Workforce State Income Simplification Act

Provisions incorporated into current legislation (H.R. 1129 / S. 1645) to address concerns raised by New York & the Federation of Tax Administrators

Issue	Prior Legislation	Concern	Current Legislation (H.R. 1129 / S. 1645)
Non-resident day threshold	More than 60 days	Day threshold too high (FTA Position: Threshold should be more than 20 days or, alternatively, more than 30 days, unless the individual earned in excess of $250,000 wages and related remuneration in the prior year, then more than 15 days)	More than 30 days
Definition of compensation	Wages "paid" to an employee	To avoid altering treatment of deferred compensation, should be wages "earned" by an employee	Wages "earned" by an employee
Definition of a nonresident work day	A work day is assigned to a nonresident state when more than 50 percent of that day's employment duties are conducted in a nonresident state	If a nonresident is in New York for any part of a work day, then the work day should be assigned to New York	A work day is assigned to a nonresident state (e.g., New York) when any part of the work day is in that nonresident state (but a single day may be assigned only to one nonresident state)
Effective date	Effective upon date of enactment	Effective date should be delayed to provide ample time to develop	Beginning of the 2nd calendar year following enactment (January 1,

		administrative guidance and to minimize fiscal impacts.	2013, which would thus have no fiscal impact until the final quarter of New York FY13-14).
Clarification of definition of Operating Rules (penalties)	n/a	Employers would not be liable to pay the tax if it was not withheld	If a tax was owed but not withheld, an employer that should have withheld could be subject to penalties for failure to withhold tax, under certain circumstances
Application of Operating Rules (review cycle)	n/a	No specific time required for an employee/employer to compare liabilities	Annual review
Use of a Time & Attendance System	Not specifically identified	If a system for time & attendance exists, an employer had an option to use or not use	If a system is designed to track employee time and attendance, it must be used

Mr. BACHUS. Thank you very much.
Mr. Porter?

TESTIMONY OF JEFFREY A. PORTER, CPA, FOUNDER AND OWNER OF PORTER & ASSOCIATES, ON BEHALF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Mr. PORTER. Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to testify today in support of H.R. 1129, the "Mobile Workforce State Income Tax Simplification Act of 2013." My name is Jeffrey Porter. I am a CPA in Huntington, West Virginia and Chair of the Tax Executive Committee of the American Institute of Certified Public Accountants.

The AICPA is the world's largest member association representing the accounting profession, with more than 394,000 members in 128 countries.

H.R. 1129 is an important step in state tax simplification. We believe the bill provides relief, which is long-overdue, from the current web of inconsistent state income tax and withholding rules on non-resident taxpayers that impact employers and employees.

After taking into consideration the costs for processing non-resident tax returns with only a small amount of tax liability, we believe states receive a minimum benefit, if any, from the tax revenue that results from an employee filing a return for just a few days of work. We believe Congressmen Coble and Johnson have reached a good balance between the states' right to tax income from work performed within their borders and the needs of individuals and businesses to operate efficiently in this economic climate.

The state tax rules applicable to non-residents are inconsistent and often bewildering to multi-state employers and employees. Many states tax income earned within the state even if the employee only works in the state for 1 day.

Some of the states have a *de minimis* number of days or *de minimis* earnings amount before requiring employers to withhold tax on non-residents, or subjecting employees to tax. However, the minimum thresholds are not administered in a uniform manner. For example, a non-resident is subject to tax after working 59 days in Arizona, 15 days in New Mexico, and 14 days in Connecticut.

Other states have a *de minimis* exemption based on the amount of wages earned, either in dollars or as a percent of total income. For example, employers are required to withhold in a non-resident state after an employee earns $1,500 in Wisconsin, $1,000 in Idaho, $800 in South Carolina, and $300 a quarter in Oklahoma. Some states have thresholds which are set at a state's personal exemption, or the standard deduction, or their filing threshold, which sometimes changes year by year.

Some states exempt, and some do not exempt, from the withholding requirement the income earned from certain activities, including training, professional development, or attending meetings. Sometimes the exemption only covers withholding. They do not address the non-resident taxpayer's filing requirement or other tax liability.

It is also important to note that approximately one-third of the states have entered into reciprocity agreements under which one border state agrees not to tax another state's residents, and vice versa. However, not all states have reciprocity agreements, and the agreements that exist are primarily geared toward non-resident employees who ordinarily commute a few miles a day to a particular adjoining state.

The reciprocity rules normally do not apply to individuals who regularly travel greater distances. And because of this gap, I prepare a significant number of non-resident tax returns for individuals who must travel for work. For example, it is not unusual for construction workers to travel to a plant shutdown to work for only a few weeks. I also know electrical linemen who go from one natural disaster area to the next to restore power after hurricanes and floods. I have filed income tax returns in as many as 10 different states a year for one of these workers.

Other everyday examples include a real estate developer's employee who travels to 20 states to visit prospective sites and spends less than a day in each state, or a store manager who attends a half-day regional meeting in an adjoining state, with some of these meetings occurring only twice a year. Another example is a car salesman who lives and primarily works in Ocean City, Maryland and occasionally has to drive a car to another dealer in Rehoboth Beach, Delaware.

Unfortunately, employers need to understand and comply with all the variations from state to state, and some states have extremely complicated rules. For example, Georgia requires withholding when a non-resident employee works more than 23 days in a calendar quarter in Georgia, or if 5 percent of their total income is earned in Georgia, or if the compensation for services in Georgia is more than $5,000. The employer must determine and calculate each of the three thresholds to determine when to withhold for each employee working occasionally in that state.

The current situation of having to withhold and file many state non-resident tax returns for just a few days of work in various states is too complicated for both employers and employees. The AICPA urges this Committee to pass H.R. 1129 and help all the taxpayers in the country ease their non-resident state income tax withholding and compliance burdens. The bill provides national uniformity and a reasonable 30-day *de minimis* threshold. Therefore, the AICPA strongly supports H.R. 1129 and respectfully commends the co-sponsors of this legislation for the development of this reasonable and much needed bi-partisan legislation.

Again, thank you for the opportunity to testify, and I would be happy to answer any questions you may have.

[The prepared statement of Mr. Porter follows:]

WRITTEN TESTIMONY OF JEFFREY A. PORTER

ON BEHALF OF THE

THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

BEFORE

THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTI-TRUST LAW

Hearing On

H.R. 1129
The "Mobile Workforce State Income Tax Simplification Act of 2013"

April 29, 2014

INTRODUCTION

Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to testify today in support of H.R. 1129, the Mobile Workforce State Income Tax Simplification Act of 2013. My name is Jeffrey Porter. I am a sole practitioner at Porter & Associates, based in Huntington, West Virginia and Chair of the Tax Executive Committee of the American Institute of Certified Public Accountants (AICPA). At Porter & Associates, we provide accounting (non-auditing) and tax services to approximately 100 local businesses and prepare nearly 900 individual income tax returns annually. We have clients in a wide range of industries, including contracting, wholesale and retail trade, medical, law, and the food industry. I am pleased to testify at the hearing today on behalf of the AICPA.

The AICPA is the world's largest member association representing the accounting profession, with more than 394,000 members in 128 countries and a 125-year heritage of serving the public interest. Our members advise clients on federal, state and international tax matters, and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized business, as well as America's largest businesses.

The AICPA is also an active leader in the National Mobile Workforce Coalition, comprised of more than 260 national businesses and groups that support this legislation.

H.R. 1129

The AICPA commends the Subcommittee for their consideration of H.R. 1129, which limits the authority of states to tax certain income of employees for employment duties performed in other states. More specifically, the bill prohibits states from taxing most non-resident employees (there are exceptions for certain professions) unless the employee is present and performing employment duties for more than 30 days during the calendar year. Furthermore, employees would not be subject to state income tax withholding and reporting requirements unless their income is subject to taxation.

AICPA'S POSITION

The AICPA strongly supports H.R. 1129. We believe the bill provides relief, which is long-overdue, from the current web of inconsistent state income tax and withholding rules that impact employers and employees.

After taking into consideration the costs for processing non-resident tax returns with only a small amount of tax liability, we believe states receive a minimum benefit (if any) from the tax revenue that results from an employee filing a return for just a few days of earnings in that state. If returns with minimal income reported were eliminated through a standard, reasonable threshold, such as in H.R. 1129, we think that most states would have an increase in resident income taxes to substantially offset any decrease in non-resident income tax revenue (assuming workers both travel to and out of the state for work). In other words, the current system as a whole unnecessarily creates complexity and costs for both employers and employees, without yielding a substantive benefit to most states.

We believe Congressmen Coble and Johnson have reached a good balance between the states' right to tax income from work performed within their borders, and the needs of individuals and businesses, and especially small businesses, to operate efficiently in this economic climate. Having a uniform national standard for non-resident income taxation, withholding and filing requirements will enhance compliance and reduce unnecessary administrative burdens on businesses and their employees. In addition to uniformity, H.R. 1129 provides a reasonable 30-day *de minimis* exemption before an employee is obligated to pay taxes to a state in which they do not reside.

H.R. 1129 is an important step in tax simplification for state income tax purposes. Therefore, the AICPA urges this Subcommittee to establish (1) a uniform standard for non-resident income tax withholding and (2) a *de minimis* exception from the assessment of state income tax as provided in H.R. 1129. This legislation should be passed as soon as possible.

BACKGROUND

The state personal income tax treatment of nonresidents is inconsistent and often bewildering to multistate employers and employees. Currently, 43[1] states plus the District of Columbia impose a personal income tax on wages, and there are many different requirements for withholding income tax for non-residents among those states. There are seven states that currently do not assess a personal income tax.[2] Employees traveling into all the other states are subject to the confusing myriad of withholding and tax rules for non-resident taxpayers.

Some of the states have a *de minimis* number of days or *de minimis* earnings amount before requiring employers to withhold tax on non-residents, or subjecting non-residents to tax. These *de minimis* rules are not administered in a uniform manner. For example, currently (for 2014), a non-resident is subject to tax after working 59 days in Arizona, 15 days in New Mexico, and 14 days in Connecticut.[3]

Other states have a *de minimis* exemption based on the amount of the wages earned, either in dollars or as a percent of total income, while in the state. For example, currently (for 2014), employers generally are required to withhold in a non-resident state after an employee earns $1,500 in Wisconsin, $1,000 in Idaho, $800 in South Carolina, and $300 a quarter in Oklahoma.[4] Other states that have thresholds before non-resident withholding is required are Georgia, Hawaii, Maine, New Jersey, New York, North Dakota, Oregon, Utah, Virginia, and West Virginia.[5] Some of these states' thresholds are set at the state's personal exemption, standard deduction, or filing threshold, which sometimes changes each year.

[1] Note that New Hampshire and Tennessee, which are included in the 43 states, do not tax wages and only subject to tax interest and dividends earned by individuals.
[2] The seven states with no personal income tax are Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming.
[3] See American Payroll Association (APA)'s American Payroll Association (APA)'s Payroll Issues for Multi-State Employers – 2014 Edition, pages 4-1 – 4-24.
[4] Ibid.
[5] Ibid.

The remainder of the states tax income earned within their borders by non-residents, even if the employee only works in the state for one day.

Some states exempt, and some do not exempt, from the withholding requirement the income earned from certain activities, including training, professional development, or attending meetings. Note that some of the states only cover exemptions from state withholding; they do not necessarily address the non-resident taxpayer's potential filing requirement and tax liability in a state or local jurisdiction. Furthermore, only a minority of states use day or income thresholds — and without any uniform standard.

It is also important to note that approximately one-third of the states (mostly bordering each other in the Midwest or East) have entered into reciprocity agreements under which one border state agrees not to tax another border state's residents' wages, and vice versa. Accordingly, the in-state resident does not need to file a non-resident border state return, and the employer does not have to withhold non-resident income taxes with respect to the in-state resident, even if the in-state resident primarily works in the non-resident state. Some type of an "exemption form" is often required to be filed in each non-resident border state.

However, not all border states have reciprocity agreements. For example, no reciprocity agreement exists between Maryland and Delaware. Therefore, both Maryland and Delaware require withholding, tax liability and filing for a car salesman who lives and primarily works in Ocean City, Maryland and occasionally has to drive a car to another dealer in Rehoboth Beach, Delaware.

Unfortunately, the existing reciprocity collaboration between some border states provides only patchwork relief with two-thirds of the country not covered by such agreements. Furthermore, the current agreements are primarily geared toward non-resident employees who ordinarily commute a few miles a day to particular adjoining states in which their employer is located. The reciprocity rules normally do not apply to individuals who regularly travel greater distances.

TYPES OF INDUSTRIES AND TAXPAYERS IMPACTED

These complicated rules impact everyone who travels for work. All types and sizes of businesses are impacted. Large, medium, and small businesses all have to understand each of the states' treatment of non-resident employee withholding and assessment of taxes and the unique *de minimis* rules and definitions. This issue affects all industries – retail, manufacturing, real estate, technology, food, services, etc.

As a tax practitioner in West Virginia, I prepare a significant number of tax returns for individuals that must travel for work. My construction worker clients frequently travel to multiple states to work on a plant shutdown for only a couple of weeks. My electrical linemen clients frequently travel from one natural disaster area to the next to restore electrical power after hurricanes, floods, etc. These clients are required to file multiple state income tax returns due to the nature of their work. I have filed income tax returns in as many as 10 different states in a year for one of these workers.

Other everyday examples include a real estate developer's employee who travels to 20 states to visit prospective sites and spends less than a day in each state, or a store manager who attends a half-day regional meeting in an adjoining state, with some of these meetings occurring only twice a year. Since there are states in which there currently is no minimum threshold, an employee's presence in that state for just one day could subject the employee to state tax withholding.

In addition, accounting firms, including small firms, conduct business across state lines. Many clients have facilities in nearby states that require on-site inspections during an audit. Additionally, consulting, tax or other non-audit services that CPAs deliver are frequently provided to clients in other states, or to facilities of local clients that are located in other states. In essence, all of these entities (small businesses, accounting firms and their clients) are affected by non-resident income tax withholding laws.

HYPOTHETICAL EXAMPLE

For example, assume an employee earns $75,000 per year, resides in Maryland, and travels to work in Indiana, Kansas, Massachusetts, and Ohio for 5 days each. Assume further that the taxpayer earns a pro rata amount of salary in each of the states of $1,500 ($75,000 * 5 days / 250 total workdays = $1,500).

Without the Mobile Workforce legislation, the employer currently must withhold on all of the employee's income in Maryland (the resident state) and the source income from different jurisdictions (which for all practical purposes, will only occur if the employer has a sophisticated time reporting system in place and the employee correctly reports the number of days worked in each state.)

Despite the relatively small amount of income in each of the non-resident states, some amount of tax is likely due in each of the states. The employer must withhold in all five states, and the employee then must file in addition to the federal tax return, income tax returns in Maryland (as a resident), and as a non-resident in Indiana, Kansas, Massachusetts, and Ohio, all of which require non-resident withholding on the first day of work in that state. Depending on the tax withheld, the non-resident state income tax returns may yield a small refund or a small additional tax payment.

While the Maryland return yields a refund, it becomes particularly complex because the employee is required to file forms showing the credit for taxes paid to each non-resident state, and Maryland does not always provide the employee with a dollar-for-dollar credit when factoring in the Maryland county-level tax required to be paid. The federal tax return also becomes more difficult because of the numerous state tax payments and refunds that impact deductions and adjustments for the state tax deduction (for alternative minimum tax purposes, for example).

The administrative burden of filing in five non-resident states, along with the complexity of the withholding rules for each state, would probably require utilization of a third-party service provider that assists with processing payroll for businesses (resulting in additional costs to the employee). The Mobile Workforce legislation makes it far easier for the employer and the employee from a compliance perspective. The taxpayer files one state income tax return in Maryland, and it is a more straightforward return (without calculations and credits for non-resident state taxes paid), and the federal income tax return is simpler as well.

CHALLENGES FOR EMPLOYERS

Employers currently face unnecessary administrative burdens to understand and comply with the variations from state to state. For example, employers are responsible for determining whether to subject an employee to withholding in a state if the employee attends out-of-state training for a couple of days, or how to account for an employee responding to business calls and e-mails on a layover in an airport. Employers also need to consider whether to withhold taxes in a state for when an employee is working on a train that travels into multiple states and jurisdictions in the Northeast Corridor, or what happens when an employee working at a business located close to a state border must cross the border for a quick mundane task.

The issue of employer tracking and complying with all the differing state and local laws is quite complicated. The employer and employee need to be aware of the individual income tax and withholding rules of each state to which that the employee travels, including whether the state has, and if the employee has exceeded, a *de minimis* threshold of days or earnings, and if there is a state reciprocity agreement that applies. Some states have extremely complicated rules for determining when to withhold for a non-resident. For example, Georgia requires withholding when a non-resident employee works more than 23 days in a calendar quarter in Georgia, or if five percent of total earned income is attributable to Georgia, or if the remuneration for services in Georgia is more than $5,000. The employer must determine and calculate each of the three thresholds to determine when to withhold for each employee working occasionally in that state.

The recordkeeping, especially if business travel to multiple states occurs, can be voluminous. The recordkeeping and withholding a state requires can be for as little as a few moments of work in another state. The research to determine any given state's individual requirement is expensive and time-consuming, especially for a small firm or small business that does not have a significant amount of resources. This research needs to be updated, at least annually, to make sure that the state law has not changed. Of course, a small firm or business may choose to engage outside assistance to research the laws of the other states; however, the business will incur an additional cost.

Many small firms and businesses use third-party payroll services rather than performing the function in-house. However, we understand that many third-party payroll service providers cannot handle multi-state reporting. For example, third-party payroll service providers generally report on a pay period basis (e.g., twice per month, bi-weekly) as opposed to a daily basis, which is necessary to properly report the performance of interstate work. Due to the software limitations, employers must track and manually adjust various employees' state income and withholding amounts to comply with different state requirements. The alternative is to pay for a more expensive payroll service.

CHALLENGES FOR EMPLOYEES

Employees face many challenges with complying with the multitude of state tax laws and requirements. When an employee travels for work to many states, even for short periods of time, each non-resident state tax return that is required is usually for a minimal amount of income and tax liability. Often, the employee is below the filing threshold, but since withholding is required, a non-resident state tax return is required, even if only to claim a refund of the withheld taxes.

UNIFORMITY AND *DE MINIMIS* EXCEPTION NEEDED

In addition to uniformity, there needs to be a *de minimis* exemption. AICPA has supported the 60-day limit contained in previous versions of similar legislation, but believes that the 30-day limit contained in H.R. 1129 is fair and workable. The 30-day limit in the bill ensures that the interstate work for which an exemption from withholding is granted does not become a means of avoiding tax or shifting income to a state with a lower tax rate. Instead, it ensures that the primary place(s) of business for an employee are where that employee pays state income taxes.

For example, employees of many small businesses often travel to other states as part of their training, research, or operations. A prime example is a business located in South Carolina, which is on the border of North Carolina and Georgia, where no reciprocity agreements exist. It is very easy for an employee to travel into three states within a five minute timeframe. For example: a small bike shop that has to occasionally cross state borders to buy a part, a catering company that delivers, and a roofing company that drives to the nearest home-improvement store (which is located across the state line).

CONCLUDING REMARKS

The current situation of having to withhold and file many state non-resident tax returns for just a few days of work in various states is too complicated for both employers and employees. The AICPA urges this Committee to pass H.R. 1129 and help all the taxpayers in the country ease their non-resident state income tax withholding and compliance burdens. The bill provides national uniformity and a reasonable 30 day *de minimis* threshold. Therefore, the AICPA strongly supports H.R. 1129 and respectfully commends the co-sponsors of this legislation for the development of this reasonable and much needed bi-partisan bill.

Again, Mr. Chairman thank you for the opportunity to testify in support of H.R. 1129, and I would be happy to answer any questions you and the Members of the Subcommittee may have.

Mr. BACHUS. Thank you, Mr. Porter.

Ms. Brown?

TESTIMONY OF LORI BROWN, CPP, DIRECTOR OF DISBURSEMENTS, CACI INTERNATIONAL, INC., ON BEHALF OF THE AMERICAN PAYROLL ASSOCIATION

Ms. BROWN. Thank you. Good afternoon. My name is Lori Brown, and I am speaking today on behalf of the American Payroll Association in favor of H.R. 1129, the "Mobile Workforce State Income Tax Simplification Act." The APA is a non-profit professional organization with more than 20,000 members. Most of our members are the payroll managers for their employers, and some of our members work for payroll service providers who in turn process the payrolls for another 1.5 million employers.

I have been a payroll professional for more than 20 years and have worked for several multi-state employers. Having worked in this environment, I have firsthand knowledge of the many challenges that employees and employers face in trying to manage their state and local income tax obligations.

Often when employees cross state borders for work, the administrative burdens on employers and employees increase exponentially. I would like to explain some of the difficulties involved, which should help clarify why H.R. 1129 is so important to both business and workers. You already have my full written testimony, so I would like to focus on a couple of real-life examples.

One day I was with a former employer. An employee came into my payroll office. He said, "Hey, Lori, why is my paycheck short?" Understand that we had 4,000 employees and I wasn't intimately aware of each employee's situation, so I did spend some time looking into it.

Eventually I was able to tell him, "John, you were working in New York last pay period, and so therefore we had to withhold taxes." He looked puzzled and he said, "Well, I live in Virginia. Do you also withhold Virginia taxes?" And I replied, "Yes, that is what we have to do."

So now, not only was he puzzled but he was upset. John's job required that he travel quite a bit for us to different states, and we withheld non-resident taxes for each of those trips. None of his previous employers had done that.

The following January, when we distributed Form W2s—those are the employee wage and tax statements—John's was six pages long. It is unusual for any worker's W2 to be more than a single page, yet John's was six. He wasn't happy about that. Like a lot of people, John was used to preparing his own tax returns. I told him, "John, you may want to hire a tax professional." "Lori, will the company pay for that?" Well, that made me a little uncomfortable. The company did actually reimburse tax preparation services for our executives but not for employees at John's level. For good or bad, I hear that is somewhat common practice among employers.

So we had an employee who had an interesting job and who was really good at it. He came to work for us and thought that he understood what he was getting into. The tax situation was a really rude surprise. In the end, he was frustrated and there was tension in the payroll office.

I have a friend in the APA, Margaret, who I had told about John's situation, and Margaret said, "Lori, not only would my company have paid for the tax service, but we would have actually paid for the extra taxes to pay to the other states just to keep him happy." Not every company is so generous, nor can they be, and some, especially small employers, don't feel they can afford that type of benefit.

There are plenty of other costs that the employer also bears that employees like John don't realize. Through the years my employers have had to hire legal and tax counsel to guide us through some incredibly complicated situations. While I was with one company, we were sending consultants to meet with clients in Colorado. We didn't have offices there, but state rules required that we register as an employer. Because we didn't have a physical presence there, we had to hire a registered agent to act on our behalf. That was another unexpected expense for us.

While we had Arizona residents on assignment in California, we also had to dedicate personnel to track the time that was worked and the wages that were earned there. We needed that data so that we could determine whether we needed to pay employment taxes weekly, quarterly, annually in California, as well as to know how much to withhold for each of those states.

When the work was over, we also had to be sure to close the accounts, turn off the withholding for the additional state, and track the employee's next work assignment.

H.R. 1129 would have eliminated a lot of trouble for the companies that I have worked for and the employees that I have paid. The 30-day safe harbor provided in the bill would have eased John's tax issues considerably since we wouldn't have had to withhold taxes for every one of his business trips, and he wouldn't have had to file tax returns for every state that he visited. He would have still had a complex return because he was in a few states longer than 30 days, but he would have been spared the extra work of filing a few extra tax returns just to get all those tax dollars returned to him.

All too often, obeying the current laws create administrative burden on both employers and employees, but also for states, for no good reason. Often, these employees do not incur actual tax debts during their short stays. The safe harbor will also provide a framework within which more employers will be able to comply. The law will provide clarity through a uniform rule that will eliminate much of the confusion created by the current patchwork of laws.

Thank you for allowing me the time to speak to you. Along with my colleagues at the American Payroll Association, my fellow panelists, I look forward to watching this important legislation pass.

[The prepared statement of Ms. Brown follows:]

Statement of
Lori Brown, CPP

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Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 1129
The Mobile Workforce State Income Tax Simplification Act of 2013

Lori Brown, CPP, brings a broad range of experience to CACI International, Inc., where she is the Director, Disbursements. She has more than 20 years of experience in payroll including government contracting, payroll tax compliance, and systems conversions. She earned the Fundamental Payroll Certification (FPC) in 2001 and the Certified Payroll Professional (CPP) designation in 2002.

Ms. Brown has been an active member of the American Payroll Association (APA) since 2002. She currently serves nationally on the National Speakers Bureau, FPC Committee, Certification Advisory Group and Hotline Referral Committee. She has received Citations of Merit from the APA each year since 2005. She is also an active member of the Washington Area Metropolitan Chapter (WMAC-APA) and currently serves as Treasurer.

Since 2004, Ms. Brown has shared her knowledge with other payroll practitioners by teaching CPP/FPC exam preparation classes and payroll knowledge concepts. She has taught at George Mason University and Prince George's Community College, and currently teaches payroll courses for the American Payroll Association nationally.

The **American Payroll Association** (APA) is a nonprofit association representing payroll professionals. APA's members include more than 20,000 payroll professionals, most of whom perform payroll-processing duties for approximately 17,000 employers. Additionally, APA's membership includes representatives of large, medium and small payroll service providers, who in turn process payrolls for an additional 1.5 million employers, representing an aggregate total of one-third of the private-sector workforce. The employers for whom APA members process payrolls are diverse in terms of business size, location and industry. As payroll specialists, APA's members must determine proper employment tax withholding, prepare and file accurate information returns and statements, correct (when necessary) such information returns and statements, calculate and deposit taxes, and maintain all necessary payroll records.

APA's central mission is to educate its members and the entire payroll industry about the best practices associated with paying America's workers their wages while successfully complying with all federal, state, and local wage payment, employment, tax withholding, child support enforcement, and information reporting laws. It achieves this mission through a variety of educational opportunities, including professional certification; print and online news publications; reference books and materials; and national, regional, and local seminars and conferences.

APA's secondary mission is to work with legislative and executive branches of all levels of government to find effective ways for employers to meet their compliance obligations and support various government objectives while minimizing the administrative burden for government, employers, and individual workers/taxpayers.

Statement of Lori Brown, Certified Payroll Professional

My name is Lori Brown, and I'm speaking today on behalf of the American Payroll Association in favor of HR 1129, the Mobile Workforce State Income Tax Simplification Act.

The American Payroll Association is a nonprofit professional organization with more than 20,000 members. Most of our members are the payroll managers for their employers; and some of our members work for payroll service providers who in turn process the payrolls for another 1.5 million employers.

I have been a payroll professional for more than 20 years and have worked for several multistate employers. This environment has provided first-hand knowledge of the many challenges that employees and employers face in trying to manage their proper state and local income tax obligations.

Often when employees cross state borders for work, the administrative burdens on employers and employees increase exponentially. I would like to explain some of the difficulties involved, which should clarify why HR 1129 is so important to both business and workers. This is an issue that cuts across all demographics, from large to small employers, public and private sector, union and nonunion, nonprofit and for-profit, and all others.

Employees working in one state while living in another state

Even in the case of an employee who resides in one state and works throughout the year in another state, state and local tax withholding and reporting can be very complicated. The employer must verify the employee's state of residence, check whether the two states have a reciprocity agreement, analyze the tax laws of both states and likely withhold tax for both states and prepare a Form W-2 for both states.

Of the 41 states with income tax withholding, most tax all wages earned within their borders by residents of other states. Some have varying de minimis amounts, or thresholds, that need to be exceeded before withholding is required. The thresholds differ widely, including various numbers of days worked within the state and various wage amounts earned.

Just as the United States taxes its citizens and residents on their worldwide income, so do the states by imposing a tax on their residents who earn income outside of their borders. If the employer has nexus – that is, a business connection – within the employee's state of residence, it generally must withhold tax for the state of residence in addition to the state in which the services are performed.

Again, the states vary in their withholding requirements for residents who work elsewhere. Some want full withholding, some want withholding only if no withholding is being done for the state in which the services are performed, and some want full withholding but provide a credit for the withholding taken for the state in which the services are performed. Further complicating matters, in addition to the varying withholding rules, each state also has its own wage reporting requirements.

I offer this background to show how much more complicated it becomes when an employee has a temporary assignment to another state.

Temporary out-of-state work assignments create burdens on employers

Whenever an employer sends an employee to a worksite outside of the state in which the employee normally performs services, the employer is subject to additional burdensome requirements, such as registering for a withholding account and withholding tax. As a payroll professional, it is my duty to ensure that taxation is handled properly for the state in which the employee is working as well as the state in which the employee claims residency. Again, there is no consistent guidance on what to do in each particular case of an employee temporarily working in a new state because each state has its own set of tax laws and regulations applicable to nonresident workers. In addition, not all states impose these regulations in the same manner, and each pairing of states creates a new requirement.

For example, the tax obligations for a California resident working temporarily in New York are completely different than they are for the same employee working in other states, say Missouri or Georgia. And if a Pennsylvania resident were to work in New York, Missouri, or Georgia, the results would be different than they are for the California resident.

The current process is not only burdensome but costly to both employees and employers.

As a multistate employer, not only are we required to withhold taxes for each of the states in which the employees may temporarily work, but we also have the responsibility to register our business in each of the states in which we are required to pay a tax. The registration process for businesses can be just as burdensome as trying to manage the tax itself. Employers may move employees from state to state numerous times a year. This work is generally temporary in nature and is constantly changing in terms of where, when, and for how long an employee is assigned.

Often employers send employees to a new state or locality at a moment's notice, and we must begin withholding and accumulating tax for a new jurisdiction before we have even registered the business. Sometimes the tax has to be deposited with the jurisdiction under a status of "account applied for," which requires a reconciliation of wages and taxes once the withholding account has been established.

This process is very time consuming and utilizes much of a payroll department staff's resources for a small group of employees. In order to ensure timely deposits and filings for all of these states due to the temporary work situations, many employers outsource their tax filing to an outside payroll service provider. But the employer still has the burden of tracking the employees' work locations and time spent in each one. This is often a manual process. Of course, outsourcing the tax filing increases the cost of compliance.

Temporary out-of-state work assignments also burden employees
Our employees are also burdened. Each employee has to file a state personal income tax return for each state for which tax was deducted from their pay. For some employees, this can result in multiple state tax returns in addition to the one for their home state. The cost to prepare such tax filings increases with the number of states and complexity involved.

Most of the states have thresholds of income – not to be confused with wages – such as a standard deduction based on filing status, below which no income tax is due. Payroll systems, of course, have no way of detecting whether an employee will be in a state for one week or three months. Rather, payroll systems generally apply withholding calculations based on an expectation that, whatever the employee earned in that jurisdiction in the current pay period, the employee will earn that much in that jurisdiction in every other pay period of the year. So, state withholding is deducted even when someone spends only one week in that state out of the entire year. In such a situation, the employee has to file a state personal income tax return and will likely receive a full refund of the amount withheld.

Because there is no standard threshold of wages as a minimum amount before withholding is required, employers have to withhold tax and report wages, employees must file income tax returns, and in cases like these, states have to process wage reports and income tax returns of individuals for whom they will refund all taxes withheld. This requires a great deal of time, effort, money, and burden with no positive return for the employer, the employees, or the states.

There is an added tax burden for residents of the nine states that do not impose state income taxes. As we know, the overall tax burdens of these state residents are comparable to those of residents in states that do impose state income taxes. As a resident of Virginia, I may be able to write off all or a portion of the taxes owed to another state against my home state tax obligation. A resident of a state that does not impose an income tax, such as Florida, Texas, Washington and others, does not have that ability and is, in effect, subject to double taxation.

HR 1129 Promotes Increased Compliance Through Decreased Burden
The Mobile Workforce Bill provides a 30-day safe harbor for employees and employers. When an employee travels into another state, he or she will not be subject to nonresident taxes for time periods of less than 30 days. The 30-day threshold is not continuous, so an employee might make a number of business trips to a state before tripping it. Once the threshold is tripped, the tax and withholding obligation reaches back to the first day worked in the state.

Due to the extreme complexity of the varying state tax regulations, many companies find complying with the laws nearly impossible. This may stem from ignorance of the law or regulations, or it may stem from a lack of adequate software systems, personnel, time, money, or other resources to meet the challenges of complying with the complex rules.

More employers will be able to comply with a law that is uniform across all states and localities and that is federally supported, versus the current patchwork of laws of which an employer might not even be aware.

It is worth noting that early versions of this bill, introduced in previous sessions of Congress, called for a 60-day safe harbor with no retroactivity. The current language has been negotiated in good faith to recognize the financial impact on states while also providing the necessary relief for businesses and workers.

The American Payroll Association and its 20,000 members strongly recommend that this legislation be considered and enacted so that the burden and cost of administering multistate taxes by American workers and American businesses can be reduced and we can ensure fair and consistent handling of this employment issue and the related taxes across the nation.

We look forward to watching this important legislation pass.

Sincerely,
Lori Brown, CPP

Appendix

Multi-State Income Taxation: For Which State Must You Withhold?

If your company has operations in more than one state, you may be faced with income tax withholding for more than one state. Sometimes, you may even have to withhold income tax for more than one state from the same employee. Withholding can get even more complicated when you have employees who live in a different state than the one they work in or who perform services in more than one state.

Deciding which state's income tax to withhold can be a confusing process. How do you determine who is a resident and whether you should follow the laws of the state of residence or the laws of the state in which services are performed? Not all states answer these basic questions in the same way and, sometimes, state laws conflict. Even the simple word "operations," as used in the paragraph above, is more complex than you might think.

From a Basic Rule of Thumb to Three Rules

The default rule of state income tax withholding that can be used as a starting point is to withhold income tax for the state in which services are performed. It can be applied in most situations in which the employee lives and works in the same state (assuming it is not one of the nine states without income tax withholding: Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming).

However, up to three other withholding rules may have to be considered when the situation is not as straightforward. For example, an employee who lives and works in one state may still be a resident of some other state; that's where withholding Rule No. 1 comes into play. In this scenario, the employee may have income tax liability for the state of residency, and, if you have operations in that state and meet certain other criteria, you may be required to withhold for that other state. On the next level, if an employee lives in one state and works in another, each state's laws of reciprocity (withholding Rule No. 2) and resident/nonresident taxation policies (withholding Rule No. 3) must be examined.

Nexus: Business Connection

The word "nexus" literally means "connection." Nexus is established by having a business presence in a state. An office, store, or factory will create nexus, as will the mere entry of an employee into a state to make a sale or perform a service call.

In the withholding context, the employer's concern is whether it has a business connection, or any operations, within a state. If it does, it is subject to the withholding laws of that state. This will make the difference in whether an employer has to withhold income tax for an employee's state of residence even though he or she performs no services there.

In 2012, the Virginia Tax Commissioner ruled that an out-of-state employer was required to withhold Virginia income tax from compensation paid to a sales employee who worked from a home office in Virginia because the employee's presence created nexus [Virginia Department of Taxation, Ruling No. 12-37, 3-30-12]. Thus, the presence of even one employee in a state may be enough to establish nexus for withholding tax purposes in some states.

If an employer does not have nexus with an employee's state of residence, but there is a reciprocal agreement between the two states, then the employer must honor the reciprocity agreement and not withhold income tax for the state where the employee works. However, the employer is not obligated to withhold income tax for the state where the employee lives because the employer does not have nexus with the resident state (the employee will have to make estimated payments).

If an employer does not have nexus in a state for which one of its employees will have a personal income tax liability, it can choose to establish a withholding account in that state and begin withholding as a courtesy to its employees. However, the payroll department should check with the corporate tax and legal departments of the company first because once you voluntarily register for one tax, you may receive inquiries from the state about other taxes for which you are not liable, such as sales tax or corporate income tax. Also, in some states, withholding and paying over taxes can make your company subject to legal process in that state.

Withholding Rule No. 1: Resident Defined

The very first determination that must be made is the state of residence of the employee. This is primary because a resident of a state is subject to the laws of that state, including its income tax laws. Furthermore, states have varying policies on withholding from residents who perform services in another state and from nonresidents who perform services within the state. To locate and apply the policies correctly, you'll need to know which state(s) can claim the employee as a resident.

Employees commonly claim that they are a resident of their "home" state. If the employee has relocated to work for you, he/she may assert that the former state is his/her state of residence because he/she still has a home and family there (and doesn't want to complete personal income tax returns for two states). An employee who works for you only during the nine months of the school year, for example, might try to claim that she is a resident of the state she grew up in but in which she now spends only three months of the year. This may be especially likely if her home state doesn't have an income tax.

It's up to you to locate and follow the rules of the appropriate state. Most states have a two-pronged definition of residency, outlining that someone will be a resident by either:

- being domiciled in the state, or
- spending more than a certain number of days in the state.

The term "domicile" usually means the place where an individual has a true, fixed, permanent home and principal establishment, and it usually means the place to which the individual intends to return. Common indicators that an individual is domiciled in a particular location include:

- property ownership,
- bank accounts,
- driver's license and vehicle registration,
- voting registration,
- presence of family, and
- club and church memberships.

Who Is a Resident?

STATE DEFINITIONS OF A RESIDENT FOR INCOME TAX WITHHOLDING	
State	**Definition**
Alabama	A person who has a permanent place of abode or who is domiciled in the state and spends more than 7 months a year in the state.
Alaska	Not applicable.
Arizona	A person domiciled or who spends more than 9 months a year in the state, unless there for a temporary or transitory purpose.
Arkansas	A person domiciled or who maintains a residence and spends 6 months a year in the state.
California	A person domiciled in the state or in the state for other than a temporary or transitory purpose (Franchise Tax Board Publication 1031 explains "temporary or transitory"). A person working on a contractual foreign assignment and in California for no more than 45 days in any consecutive 18-month period is not a resident.
Colorado	A person who maintains a permanent place of abode or who is domiciled in the state and spends at least 6 months of the year in the state.
Connecticut	A person who is domiciled or has a permanent place of abode and spends more than 183 days of the year in the state. Excludes certain individuals domiciled in the state but present in a foreign country for at least 450 days during any period of 548 consecutive days.
Delaware	A person who is domiciled, maintains a permanent place of abode, and spends more than 183 days of the year in the state. A person who is in a foreign country for at least 495 full days in any consecutive 18-month period, is not present in Delaware for more than 45 days during that period, and does not have a permanent place of abode in Delaware where a spouse, children or parents are present for more than 45 days during that period, is not a resident.
Dist. of Col.	A person who is domiciled in D.C., or who has a place of abode in D.C. for 183 days or more during the year.
Florida	Not applicable.
Georgia	Anyone who is a legal resident on income tax day, resides in the state on a regular basis (not temporary or transitory), or resided in the state for 183 days of the immediately preceding 365 days.
Hawaii	Any person domiciled or residing in the state; to "reside" in the state means to be in the state for other than a temporary or transitory purpose and for more than 200 days of the year.
Idaho	A person who is domiciled or maintains a place of abode in Idaho for the entire year and spends more than 270 days of the year in Idaho.
Illinois	A person who is in Illinois for other than a temporary or transitory purpose, or who is domiciled in Illinois but absent for a temporary or transitory purpose during the year.
Indiana	Anyone who resides in Indiana for the entire year, or has a permanent place of abode in Indiana and spends more than 183 days of the year in the state.
Iowa	A person domiciled in or who maintains a permanent place of abode in the state.

STATE DEFINITIONS OF A RESIDENT FOR INCOME TAX WITHHOLDING	
State	**Definition**
Kansas	A person domiciled in or who spends more than 6 months of the year in the state.
Kentucky	A person who is domiciled, maintains a permanent place of abode, and spends more than 183 days of the year in the state.
Louisiana	Anyone who is domiciled, maintains a permanent place of abode, or spends more than 6 months of the year in the state.
Maine	A person who is domiciled, maintains a permanent place of abode, and spends more than 183 days of the year in the state.
Maryland	A person who is domiciled in Maryland on the last day of the year, or has a place of abode in Maryland for more than 6 months of the year regardless of domicile.
Massachusetts	A person who is domiciled in the state, or who maintains a permanent place of abode and spends more than 183 days of the year in the state.
Michigan	A person who lives in the state at least 183 days of the tax year (or more than half the days for a tax year of less than 12 months).
Minnesota	A person who is domiciled in or who maintains a place of abode in the state and spends more than one-half of the year in the state.
Mississippi	A person who is domiciled or who has a residence in the state.
Missouri	A person who is domiciled or who has a permanent place of abode in Missouri and spends more than 183 days of the year in the state.
Montana	A person who has a domicile or who maintains a permanent place of abode within the state and is temporarily absent but has not established a permanent residence elsewhere.
Nebraska	A person who is domiciled in or who has a permanent home in Nebraska and spends more than 6 months of the year in the state.
Nevada	Not applicable.
New Hampshire	Not applicable.
New Jersey	Any person domiciled in the state for the full year or who has a permanent home in the state and spends more than 183 days of the year in the state.
New Mexico	An individual domiciled in New Mexico during all of the tax year, or an individual who is physically present in New Mexico for a total of 185 days or more in the aggregate during the tax year, regardless of domicile (i.e., the place where an individual has a true, fixed, permanent home); an individual domiciled in New Mexico who is physically present in New Mexico for fewer than 185 days and moves out-of-state with the intention of living outside of New Mexico permanently is not a resident for the period after the change of domicile.

STATE DEFINITIONS OF A RESIDENT FOR INCOME TAX WITHHOLDING	
State	**Definition**
New York	A resident is an individual: (A) who is domiciled in NYS, unless: (1) the person does not have a permanent place of abode in NYS, has a permanent abode elsewhere, and spends no more than 30 days of the year in NYS; or (2) is in a foreign country or countries for at least 450 out of 548 consecutive days (approximately 15 out of 18 months), the individual, spouse (unless legally separated), and minor children are not in NYS for more than 90 days during the 548-day period and during a period of less than 12 months, the individual is present in the state for a number of days not exceeding the number bearing the same ratio to 90 as the less-than-12-month period bears to 548 days; or (B) who is not domiciled in NYS but has a permanent place of abode in NYS for substantially all of the tax year (interpreted as more than 11 months) and spends in the aggregate more than 183 days of the tax year in NYS, unless the individual is in active military service.
North Carolina	A person domiciled in the state during any part of the year or who resides in the state for other than a temporary or transitory purpose. A person living in the state for more than 183 days of the tax year is presumed to be a resident.
North Dakota	A person domiciled, or who maintains a permanent place of abode within the state and spends more than 7 months of the year in the state.
Ohio	A person domiciled in or who maintains a permanent place of abode in the state.
Oklahoma	A person who maintains a permanent place of abode, or is domiciled in the state and spends more than 7 months of the year in the state.
Oregon	A person domiciled in Oregon or who maintains a permanent place of abode in Oregon and spends more than 200 days of the year in the state.
Pennsylvania	A person who is domiciled in the state (unless a permanent place of abode is maintained elsewhere and no more than 30 of the year days are spent in the state) or who has a permanent place of abode in the state and spends more than 183 days of the year in the state.
Rhode Island	A person who is domiciled in or who maintains a permanent place of abode in the state and spends more than 183 days of the year in the state.
South Carolina	A person domiciled in the state.
South Dakota	Not applicable.
Tennessee	Not applicable.
Texas	Not applicable.
Utah	A person who is domiciled in or who maintains a permanent place of abode in Utah and spends more than 183 days of the year in the state.
Vermont	A person who is domiciled or who maintains a permanent place of abode in Vermont and spends more than 183 days of the year in the state.
Virginia	A person who is domiciled or who maintains a permanent place of abode in Virginia and spends more than 183 days of the year in the state.
Washington	Not applicable.

STATE DEFINITIONS OF A RESIDENT FOR INCOME TAX WITHHOLDING	
State	**Definition**
West Virginia	A person who is domiciled (unless he/she has a permanent place of abode elsewhere and spends no more than 30 days of the year in the state) or who maintains a permanent place of abode and spends more than 183 days of the year in the state.
Wisconsin	A person who is domiciled in the state or in the state for other than a temporary or transitory purpose.
Wyoming	Not applicable.

Withholding Rule No. 2: Reciprocity

If an employee performs services in a state other than the state of residence, you must find out whether the two states have a reciprocal agreement. A reciprocal agreement allows you to withhold only for the state of residence, as opposed to the state in which services are performed. (This is an example of why the rule of thumb is only a starting point.) Accordingly, you would report wages only to the state of residence when completing Boxes 16-17 (state wages) of federal Form W-2, Wage and Tax Statement (see p. A-1). In most cases, the employee will be required to submit a certificate of nonresidence for the state in which he/she works before you can honor the reciprocal agreement.

The general purpose of reciprocity is to make things administratively easier for the employee and employer. The employee will have to file only one state personal income tax return, and the employer will withhold only for the state in which the employee lives. This is especially helpful if you have an employee who performs services in two or more states that have reciprocity with the state of residence. For example, for an employee who lives in Kentucky, works in Kentucky, Illinois, and Indiana, and submits certificates of nonresidence for Illinois and Indiana, the employer will need to withhold only Kentucky income taxes because the three jurisdictions have reciprocal agreements with each other. Without reciprocity, the employer would have to withhold for all three jurisdictions based on the time worked in each one. On the other hand, the presence of a reciprocal agreement requires you to change the state of withholding and reporting if the employee moves his/her residence from one state to another, even though there has been no change in the state in which the services are performed.

Minnesota and Wisconsin fail to restore reciprocity for 2014. Minnesota and Wisconsin did not meet the October 1, 2013, deadline for an income tax reciprocity agreement to be in place for tax year 2014. Earlier in 2013, both states' tax departments completed benchmark studies in an effort to restore reciprocity, which ended on January 1, 2010. Unfortunately, the two states could not agree on an additional $6 million that Minnesota wanted Wisconsin to pay pay for tax credits. It remains to be seen whether restoring reciprocity will be a goal for 2015.

Reciprocal Coverage

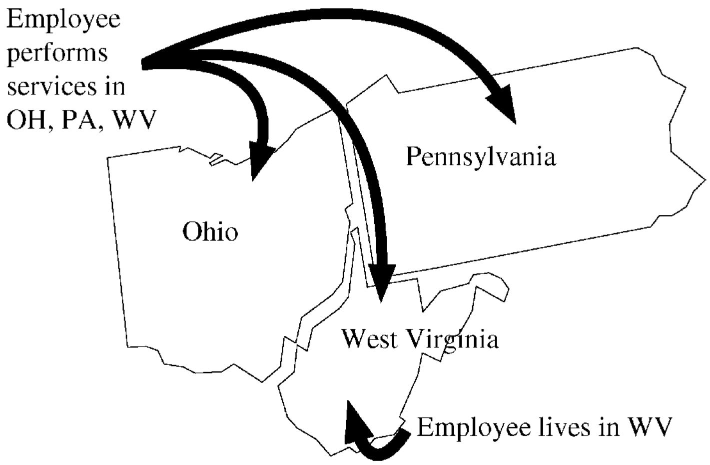
RECIPROCAL WITHHOLDING AGREEMENTS BETWEEN STATES	
State	**Reciprocal Agreements**
Alabama	None
Alaska	Not applicable.

RECIPROCAL WITHHOLDING AGREEMENTS BETWEEN STATES	
State	**Reciprocal Agreements**
Arizona	None, but a nonresident who performs services in Arizona for an Arizona employer may be exempt from withholding if: (1) the employee is a resident of California, District of Columbia, Indiana, Oregon, or Virginia; and (2) the employee can claim a personal income tax credit for income taxes paid to his/her state of residence. Arizona residents receive the same treatment from those states if they perform services there.
Arkansas	Border city exemption for residents of Texarkana, which is located on the border of Texas and Arkansas. Residents of Texarkana, Arkansas are exempt from Arkansas state income tax and withholding. Residents of Texarkana, Texas are exempt from Arkansas income tax for wages earned in Texarkana, Arkansas. Agreement does not apply to residents of other cities or other Texas residents working in other parts of Arkansas. Employer must supply Form AR4EC(TX), *Texarkana Employee's Withholding Exemption Certificate.* Employer copy filed with Form AR-3Q-TEX.
California	None
Colorado	None
Connecticut	None
Delaware	None
Dist. of Col.	A reciprocal agreement is in effect with Maryland and Virginia. Nonresident employees of DC are not subject to DC withholding and must file Form D-4A, *Certificate of Nonresidence in the District of Columbia.*
Florida	Not applicable.
Georgia	None
Hawaii	None
Idaho	None
Illinois	Residents of Iowa, Kentucky, Michigan, and Wisconsin are not subject to Illinois income tax withholding for wages earned in Illinois if Form IL-W-5-NR, *Employee's Statement of Nonresidence in Illinois,* is filed with the employer; likewise, Illinois employees working in any of those states will not be taxed there. The reciprocal agreement with Indiana expired at the end of 1997.
Indiana	Residents of Kentucky, Michigan, Ohio, Pennsylvania, and Wisconsin are exempt from Indiana income tax withholding (likewise, Indiana residents working in any of those states will be exempt there). They should complete Form WH-47, *Certificate of Residence.* The reciprocity is not applicable to county income taxes. The reciprocal agreement with Illinois expired at the end of 1997.
Iowa	Residents of Illinois have Illinois state tax withheld only if Form 44-016, *Employee's Statement of Nonresidence in Iowa,* is filed with the employer.
Kansas	None
Kentucky	Residents of Illinois, Indiana, Michigan, Ohio, West Virginia, and Wisconsin have only their resident state tax withheld if Form 42A809, *Certificate of Nonresidence*, is filed with the employer. Daily commuters between Kentucky and Virginia are provided reciprocal benefits.

RECIPROCAL WITHHOLDING AGREEMENTS BETWEEN STATES	
State	**Reciprocal Agreements**
Louisiana	None
Maine	None
Maryland	No Maryland tax is withheld from employees who commute daily to Maryland and reside in the District of Columbia, Pennsylvania, Virginia, and West Virginia. A certificate of nonresidence (Form MW507, *Employee's Maryland Withholding Exemption Certificate)* must be filed with the employer.
Massachusetts	None
Michigan	Michigan employers do not withhold Michigan state income tax from residents of Illinois, Indiana, Kentucky, Minnesota, Ohio, and Wisconsin. Michigan employees must file certificates of nonresidence to be exempt from withholding. A form is not provided.
Minnesota	Residents of Michigan and North Dakota are exempt from Minnesota withholding. Form MWR, *Reciprocity Exemption/Affidavit of Residency*, is required to certify residency. The reciprocal agreement with Wisconsin was terminated, effective 1-1-10.
Mississippi	None
Missouri	None
Montana	Montana employers are not required to withhold Montana income tax from residents of North Dakota. A certificate of North Dakota residency is required, Form MT-R, *Reciprocity Exemption From Withholding.*
Nebraska	None
Nevada	Not applicable.
New Hampshire	Not applicable.
New Jersey	Pennsylvania residents filling out a certificate of nonresidence (Form NJ-165, *Employee's Certificate of Nonresidence in New Jersey*) are not subject to New Jersey withholding.
New Mexico	None
New York	None
North Carolina	None
North Dakota	Residents of Minnesota and Montana working in North Dakota are not required to have North Dakota tax withheld. Form NDW-R, *Reciprocity Exemption From Withholding for Qualifying Minnesota and Montana Residents Working in North Dakota,* should be filed with their employer annually.
Ohio	Ohio has reciprocal agreements with Indiana, Kentucky, Michigan, Pennsylvania, and West Virginia. Form IT 4NR, *Employee's Statement of Residency in a Reciprocity State*, must be filed with the employer to claim the exemption.
Oklahoma	None
Oregon	None

RECIPROCAL WITHHOLDING AGREEMENTS BETWEEN STATES	
State	**Reciprocal Agreements**
Pennsylvania	Pennsylvania has reciprocal agreements with Indiana, Maryland, New Jersey, Ohio, Virginia, and West Virginia. Form REV-419, *Employee's Nonwithholding Application Certificate,* must be filed with the employer. For New Jersey residents who work in Pennsylvania, the amount of any Pennsylvania local income tax withholding reduces the amount of New Jersey income tax to be withheld from those same wages (this is a credit arrangement).
Rhode Island	None
South Carolina	None
South Dakota	Not applicable.
Tennessee	Not applicable.
Texas	Not applicable.
Utah	None
Vermont	None
Virginia	Full reciprocal agreement with West Virginia but a certificate of nonresidence in Virginia must be filed. Daily commuters from District of Columbia, Kentucky, and Maryland filing a certificate of nonresidence are exempt from Virginia tax. Pennsylvania and West Virginia residents can file the certificate only if subject to the income tax of the resident state.
Washington	Not applicable.
West Virginia	Reciprocal agreements are in place with Kentucky, Maryland, Ohio, Pennsylvania, and Virginia. A *West Virginia Certificate of Nonresidence* (found on the back of Form WV/IT-104) must be filed with the employer.
Wisconsin	Illinois, Indiana, Kentucky, and Michigan residents working in Wisconsin must provide a written statement to their employer certifying the place of residence in order for the employer to not withhold Wisconsin income tax. Form W-220, *Nonresident Employee's Withholding Reciprocity Declaration*, must be filed with the employer. The reciprocal agreement with Minnesota was terminated, effective 1-1-10. However, under a special withholding arrangement, employers of Wisconsin residents working in Minnesota are not required to withhold if: (1) the employee is a resident of Wisconsin when wages are earned in Minnesota; and (2) the same wages earned by the Wisconsin resident and subject to Minnesota withholding would also be subject to Wisconsin withholding. *Note:* Employees may have to make estimated payments if they expect to owe $200 or more in Wisconsin income taxes.
Wyoming	Not applicable.

Withholding Tax Reciprocity



Report all wages on Form W-2 (see p. A-1) for West Virginia and withhold West Virginia tax from all wages, as West Virginia has reciprocal agreements with Ohio and Pennsylvania. Employee must have submitted to the employer the Ohio and Pennsylvania forms that declare nonresidence in those states.

Withholding Rule No. 3: Resident/Nonresident Taxation Policies

If an employee is a resident of one state but performs services in another, and there is no reciprocal agreement, you must consider the laws of both states. The correct determination of the state of residency (Rule No. 1) is very important in these situations because it tells you which state's laws you may need to consider in addition to those of the state in which the employee works.

The state in which the services are performed will almost always require withholding from nonresidents who come into the state to work (withholding only from the wages for services performed in that state). A few states have exceptions to this, usually based on whether the employee works in the state for less than a certain length of time or earns less than a certain amount of money. For example, if a California resident works in Arizona, Arizona withholding is required if the employee is physically present in the state for 60 days or more. In general, an employer is always subject to the laws of any state in which it has an employee performing services, whether or not the employer has a facility (such as an office, factory, or store) in the state.

Note: Effective for tax year 2009 and thereafter, the Military Spouses Residency Relief Act (Pub. L. 111-97) provides that a spouse of a servicemember retains residency in his or her home state for tax purposes if he or she moves to another state to be with the servicemember who is in the state due to military orders. Thus, income earned in the work state by the military spouse is not subject to taxation by the work state. However, the military spouse remains liable for income tax in the home state and may have to pay estimated taxes (see p. 4-56 for more information).

The employee's state of residence may also need to be considered even if the employee doesn't work there. If the employer has a business connection, also referred to as "nexus," with the state in which the employee resides, then the employer is subject to the laws of that state, and may be required to withhold that state's income tax, in addition to the tax for the state in which the employee is working. For example, if the California resident works exclusively in Arizona for six months, and if the employer has nexus with California:

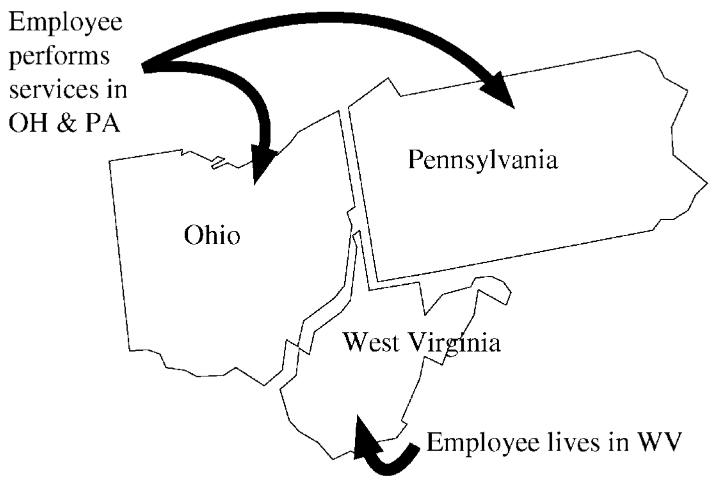
- Arizona withholding is required (the 60-day threshold is exceeded), and
- California withholding is required, with a credit for income tax withheld for the work-state (in this case, Arizona).

In this situation, the employer must first calculate and withhold Arizona income tax. Then the employer must calculate California income tax on the same wages and, if the California tax is greater, withhold an amount equal to the difference between the California income tax and the Arizona income tax. If the California tax is less than the Arizona tax, no California tax need be withheld.

If, however, the employer does not have nexus with California, then the employer is not subject to the laws of that state and is not required to withhold that state's income tax. However, the employee may have personal income tax liability on these and all other earned wages by virtue of being a resident of that state.

No state income tax on retirement income of nonresidents. Pension plan payments may be subject to state income tax as well as federal income tax. One matter of controversy in this area has been state taxation of pension income received by nonresidents who at one time worked in the state. The APA, along with other organizations, recognized the nearly impossible recordkeeping and other administrative burdens such an approach would put on employers, and they worked to convince Congress to limit such taxation. These efforts proved fruitful when President Clinton signed Pub. L. No. 104-95, which prohibits states from imposing income tax on the retirement income of nonresidents.

Withholding Tax Reciprocity



Employer is not required to withhold any state income tax. Employee does not owe tax to Ohio or Pennsylvania, due to the reciprocal agreements those states have with the employee's state of residence (West Virginia). Employee will owe tax to West Virginia, but the employer doesn't have nexus with that state and is not required to withhold and remit that state's tax.

Employees Working in Multiple States Without Reciprocity

If an employee works in multiple states that do not have reciprocity with the employee's state of residence, then the amount of wages earned in each state must be separately examined under withholding Rule No. 3. The first step is to split the wages by state, which may be done by the number of hours worked for an hourly employee or days worked for a salaried employee, or by the sales volume for a commissioned salesperson. The employer will definitely have nexus in the state in which services are performed and will most likely (depending on the state's law) need to withhold the work-state's tax from the wages earned within the state. In addition, if the employer has nexus in the employee's resident-state, it may need to consider withholding for that state from these wages as well.

There are exceptions to this process under the Amtrak Reauthorization and Improvement Act of 1990 (Pub. L. 101-322). Railroad and motor carrier employees (i.e., operators of a commercial motor vehicle, like a tractor, trailer, or semitrailer) who work in more than one state are subject only to the state and local income tax laws of their state of residence, regardless of where they work. Employees in air transportation are subject to withholding for their state of residence and any other state in which they earn more than half of their wages.

Under Pub. L. 106-489, merchant mariners employed in interstate commerce are subject to the state and local income taxes of their state of residence.

Telecommuters

Generally, employers withhold income tax for the state in which an employee performs services. This means that a telecommuter who works from home, in a different state than the location of the office to which he or she reports, is subject to tax by the resident state.

The convenience of the employer test. New York's tax policy on nonresident employees has been criticized because it can lead to double taxation for telecommuters. Besides other factors, New York sources income based on the "convenience of the employer test" (see 20 NYCRR §132.18). A New York nonresident who performs services for his or her employer *both* inside and outside of New York may apportion New York income based on the number of days that services are actually performed within New York. The caveat is that the nonresident employee must prove that the work performed outside of New York is done so for the employer's necessity, and not the employee's convenience.

New York is not the only state to use the convenience of the employer test. Two other states have very similar convenience rules:

1. Nebraska – Neb. Adm. Code Title 316, Ch. 22, Reg. 22-003.01C(1)
2. Pennsylvania – 61 Pa. Code §109.8

However, New York has been criticized because of its aggressive enforcement. In New York, the convenience of the employer test is notoriously difficult to prove. In one case, a computer programmer who lived in Nashville, Tennessee, and worked at his employer's New York office only when needed (about 60 days a year) was not allowed to apportion his income. He unsuccessfully argued that the test should not be applied to someone who lives well beyond commuting range and whose principal place of business is outside of New York (*Huckaby v. New York State Div. of Tax Appeals,* 776 N.Y.S. 2d 125 (2004)). The court held that the employee was working at home for his own convenience. The employer did not require him to work at home in Nashville. In October 2005, the U.S. Supreme Court declined to hear the appeal of this case.

While many states tax their residents on their total income, no matter where earned, many of those states will allow a resident to take a credit on the personal income tax return for taxes paid to another state (the "work state") on earnings for services performed in that other state. The problem for a telecommuter is that the resident state is the "work state."

> ***Example:*** Sally, a Connecticut resident, works two days at home and three days in New York each week. Because it is her "home state," Connecticut will tax her on the full five days of income. New York will tax the income earned over the three days in New York, and it will tax the income earned over the two days in Connecticut unless Sally can prove that her work was performed at home for her employer's necessity and not for her own convenience (very hard to prove).
>
> And while a state generally gives a credit against its income tax for taxes paid to another state, Connecticut does not allow a credit for taxes paid to New York on earnings for work performed in Connecticut because it does not recognize New York's right to tax the income. In a nutshell, Sally is taxed by New York because she could have worked there and she is taxed by Connecticut because she actually worked there. Thus, on the income for services performed in Connecticut (two days a week), Sally is fully taxed twice.
>
> New Jersey, another border state of New York, allows a credit for taxes paid to New York in this sort of situation.

Revised application of convenience of the employer test. In May 2006, the New York State Department of Taxation and Finance issued a memorandum explaining its revised application of the convenience of the employer test to a nonresident or part-year resident employee who performs services for a New York employer at both a New York location and a home office located out-of-state [TSB-M-06(5)I].

Effective for tax years beginning on or after January 1, 2006, any normal workday spent at an out-of-state home office by an individual whose assigned or primary office is in New York will be treated as a day worked outside New York if the home office is a bona fide employer office. Any day spent at the home office that is not a normal workday will be considered a nonworking day. A "normal workday" means any day that the individual performed the usual duties of his or her job. Responding to occasional phone calls or emails, reading professional journals, or being available if needed does not constitute "performing the usual duties" of his or her job.

Previously, days worked at home by a nonresident were considered workdays in New York if the employee's assigned or primary work location was at an established office or other place of business of the employer in New York. If the employee's assigned or primary work location was at an established office or other bona fide place of business of the employer outside New York, then any normal workday worked at home was treated as a day worked outside New York.

Factors to determine if a home office is a bona fide employer office. The following factors must be used by an employee to determine if his or her home office constitutes a bona fide employer office. The factors are divided into three categories: the primary factor, secondary factors, and other factors. For an office to be considered a bona fide employer office it must satisfy either: (1) the primary factor; or (2) at least four of the secondary factors and three of the other factors.

Primary factor. The primary factor is that the home office contains or is near specialized facilities. If the employee's duties require the use of special facilities that cannot be made available at the employer's place of business, but those facilities are available at or near the employee's home, then the home office will meet this factor (e.g., an employee uses a test track near his or her home to test new cars). However, if the employee's duties require the use of specialized scientific equipment that is set up at or near the employee's home, but could physically be set up at the employer's place of business located in New York, then the home office would not meet this factor.

Secondary factors. There are six secondary factors:

1. The home office is a requirement or condition of employment. For example, a written employment contract provides that the employee must work from home to perform specific duties for the employer.
2. The employer has a bona fide business purpose for the employee's home office location. For example, an engineer is working on several projects in his or her home state and it is necessary that he or she have an office nearby in order to meet project deadlines.
3. The employee performs some of the core duties of his or her employment at the home office. For example, a stock broker executes stock purchases and sales from his or her home office (the core duties of a stock broker include the purchase and sale of stock).
4. The employee meets or deals with clients, patients, or customers on a regular and continuous basis at the home office. For example, the employer has clients located near the employee's home office and the employee must meet with the clients at the home office once a week to perform the duties of his or her job.
5. The employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business. For example, an employer reduces office space to decrease rental expenses and allows an employee to work from home. If the employee must come to the office, he or she uses a "visitor's" cubicle, conference room, or other available space that is also used by other employees.
6. Employer reimbursement of expenses for the home office. The employer must reimburse the employee for substantially all (80% or more) of the expenses (e.g., utility expenses, insurance) related to the home office, or must pay the employee a fair rental value for the home office space used and furnish or reimburse the employee for substantially all (80% or more) of the supplies and equipment used by the employee.

Other factors. There are 10 other factors:

1. The employer maintains a separate telephone line and listing for the home office.
2. The employee's home office address and phone number are listed on the business letterhead and/or business cards of the employer.
3. The employee uses a specific area of the home exclusively to conduct the business of the employer that is separate from the living area.
4. The employer's business is selling products at wholesale or retail and the employee keeps an inventory of the products or product samples in the home office for use in the employer's business.
5. Business records of the employer are stored at the employee's home office.
6. The home office location has a sign indicating a place of business of the employer.
7. Advertising for the employer shows the employee's home office as one of the employer's places of business.
8. The home office is covered by a business insurance policy or by a business rider to the employee's homeowner's insurance policy.

9. The employee is entitled to and actually claims a deduction for home office expenses for federal income tax purposes.
10. The employee is not an officer of the company.

WITHHOLDING ON RESIDENTS AND NONRESIDENTS		
State	**Residents: Withholding Required on Services Performed Out-of-State (and W-2 Wage Reporting Requirement), If Nexus**	**Nonresidents: Withholding Required on Services Performed In-State**
Alabama	Yes (report wages), unless withholding is taken for the state where services are performed (do not report wages).	Yes
Arizona	No, but the employer may withhold for AZ if the employee requests it on Form A-4V (withholding for either state should be separately reported on Form W-2).	Yes, if physically present in the state for 60 days or more in the calendar year.
Arkansas	Yes (report wages), unless withholding is taken for the state where services are performed (do not report wages).	Yes, but see reciprocity.
California	Yes, allowing a credit for withholding taken for the state where services are performed. Report wages on Form W-2 and quarterly Form DE 9C.	Yes. The amount of wages subject to PIT withholding is that portion of the total number of working days employed in CA compared to the total number of working days employed in both CA and the other state. Report all PIT wages and PIT withheld on Form DE 9C.
Colorado	Yes (report wages), unless withholding is taken for the state where services are performed (do not report wages).	Yes

WITHHOLDING ON RESIDENTS AND NONRESIDENTS		
State	**Residents: Withholding Required on Services Performed Out-of-State (and W-2 Wage Reporting Requirement), If Nexus**	**Nonresidents: Withholding Required on Services Performed In-State**
Connecticut	Yes, allowing a credit for withholding taken for the state where services are performed (report wages).	Yes. *Note:* Withholding is not required for nonresidents assigned to a primary work location outside of CT if they work in CT for 14 or fewer days in a calendar year. Any part of a day spent performing services in CT counts as a full day. When a nonresident employee, who is reasonably expected to work 14 or fewer days in CT in a calendar year, actually works more than 14 days in CT, withhold tax on wages paid after 14th day. The 14-day rule does not apply to payments made to nonresident athletes and entertainers performing services in CT. Report wages paid to a nonresident employee who works 14 or fewer days during a calendar year in CT on Form CT-941 and Form W-2 in box 16 (wages are taxable to employee).
Delaware	No (report wages). However, the employee may elect to have DE tax withheld. If so, allow a credit for withholding taken for the state where services are performed.	Yes *Note:* Nonresident employees of an out-of-state employer who perform emergency-related work during a declared disaster period are not subject to withholding.
Dist. of Col.	Yes (report wages).	No, provided the employee submits Form D-4-A, *Certificate of Non-Residence in the District of Columbia,* to the employer.
Georgia	Yes (report wages), unless withholding is taken for the state where services are performed (report wages).	Yes, if the nonresident works more than 23 days in a calendar quarter in GA, or if 5% of total earned income is attributable to GA, or if the remuneration for services in GA is more than $5,000.

WITHHOLDING ON RESIDENTS AND NONRESIDENTS		
State	**Residents: Withholding Required on Services Performed Out-of-State (and W-2 Wage Reporting Requirement), If Nexus**	**Nonresidents: Withholding Required on Services Performed In-State**
Hawaii	Yes, if either (a) the regular place of employment is in HI, or (b) wages are paid from an office within HI (do not report wages).	Yes, unless these four conditions are met: (1) the employee will perform services in HI for no more than 60 days in the calendar year; (2) he/she is paid from an office outside HI; (3) his/her regular place of employment is outside HI; and (4) the employer does not reasonably expect the employee to perform services in HI for more than 60 days during the calendar year. If all conditions are met except the 60-day requirement and the Director of Taxation finds that withholding would be burdensome or enforcement impractical, an exception from the withholding requirement may be allowed.
Idaho	Yes (report wages), unless withholding is taken for the state where services are performed (report wages).	Yes, if the employee earns $1,000 or more in the year in ID and is subject to federal income tax withholding (report all ID wages on Form W-2 even if no ID tax is withheld).
Illinois	Yes, if any of the following conditions are met (report wages): (a) the employee's services are primarily performed in IL (out-of-state services are incidental to services in IL); (b) the services are not primarily performed in any one state, but some services are performed in IL, and either the base of operations is in IL, or, if there is no base of operations, the place from which the services are directed or controlled is in IL; or (c) the services are not primarily performed in any one state but some services are performed in IL, and the base of operations or the place from which the services are directed or controlled is not in any state in which the employee performs services. No wage reporting required if resident works 100% in another state that has withholding, works in another state that does not have withholding (i.e., no state income tax), or works in another state where the employee is not subject to withholding (for whatever reason).	Residents of states with which IL has reciprocity are not subject. Otherwise, IL income tax must be withheld on all income for services performed within and outside IL if either of the following conditions are met: (a) the employee's services are primarily performed in IL (out-of-state services are incidental to services in IL); or (b) the services are not primarily performed in any one state, but some services are performed in IL, and either the base of operations is in IL, or, if there is no base of operations, the place from which the services are directed or controlled is in IL.

WITHHOLDING ON RESIDENTS AND NONRESIDENTS		
State	**Residents: Withholding Required on Services Performed Out-of-State (and W-2 Wage Reporting Requirement), If Nexus**	**Nonresidents: Withholding Required on Services Performed In-State**
Indiana	Yes, withhold IN state and county income taxes if IN liability exceeds taxes withheld in work state (report wages). If work state does not levy a withholding tax on wages, withhold IN state and county taxes (report wages).	Yes, but see reciprocity.
Iowa	Yes, withhold for the state in which the wages were earned, except Illinois (report all wages on Form W-2 for the work state(s)).	Yes, but see reciprocity.
Kansas	Yes, allowing a credit for withholding taken for the state where services are performed (do not report wages earned out-of-state, only KS wages).	Yes. Determine withholding using the apportionment formula found on Form K-4C, *Kansas Nonresident Employee Certificate for Allocation of Withholding Tax,* submitted by the nonresident employee.
Kentucky	Yes (report wages).	Yes, but see reciprocity.
Louisiana	Yes (report wages), unless withholding is taken for the state where the services are performed (do not report wages).	Yes. A nonresident who works partly within and partly outside LA must file Form R-1300 (L-4), *Employee's Withholding Exemption Certificate,* with the employer to be exempt from LA with-holding on wages paid for services per-formed outside LA.
Maine	Yes (report wages).	Yes, if the nonresident works in ME for more than 12 days during the year and earns more than $3,000 in gross income during the year from all sources in Maine. However, the performance of certain personal services for 24 days during a year does not count toward the 12-day threshold (employment-related training or education, certain management functions, research and development, and new investment).

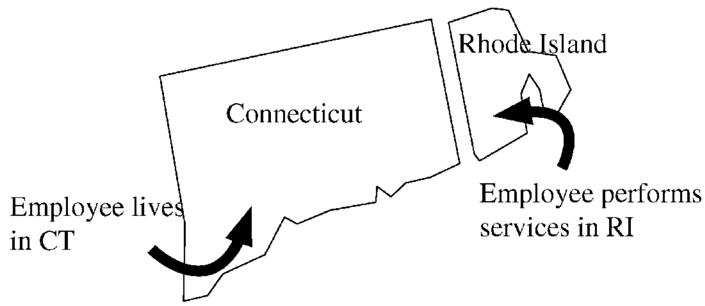
WITHHOLDING ON RESIDENTS AND NONRESIDENTS		
State	**Residents: Withholding Required on Services Performed Out-of-State (and W-2 Wage Reporting Requirement), If Nexus**	**Nonresidents: Withholding Required on Services Performed In-State**
Maryland	Yes (report wages).	Yes, but see reciprocity. *Note:* Nonresident employees of an out-of-state employer who perform disaster or emergency-related work during a declared disaster period are not subject to state or county income tax withholding. The employer must provide a statement to the Comptroller's Office.
Massachusetts	Yes, allowing a credit for withholding taken for the state where services are performed (report wages on Form W-2 but do not send it to the state; also report all wages on quarterly Form WR-1).	Yes
Michigan	Yes (report wages).	Yes, but see reciprocity.
Minnesota	Yes (report wages), provided federal income tax withholding from the employee's wages is required.	Yes, but see reciprocity.
Mississippi	Yes (report wages), unless withholding is taken for the state where services are performed (do not report wages).	Yes. Wages for services performed by a nonresident outside of MS are also subject to MS withholding if the nonresident's principal place of employment is within MS and he/she only occasionally works outside of MS, unless withholding is required by the other state in which the services are performed.
Missouri	Yes (report wages), unless withholding is taken for the state where services are performed (report wages).	Yes. A nonresident who works partly within and partly outside MO must file Form MO W-4A, *Certificate of Nonresidence/Allocation of Withholding Tax,* with the employer to exempt from MO withholding wages paid for services performed outside MO.
Montana	Yes (report wages).	Yes, but see reciprocity.

WITHHOLDING ON RESIDENTS AND NONRESIDENTS		
State	**Residents: Withholding Required on Services Performed Out-of-State (and W-2 Wage Reporting Requirement), If Nexus**	**Nonresidents: Withholding Required on Services Performed In-State**
Nebraska	Yes, allowing a credit for withholding taken for the state where services are performed (report wages).	Yes. A nonresident who works partly within and partly outside NE must file Form 9N, *Employee Certificate for Allocation of Withholding Tax*, with the employer to designate the approximate percentage of the wages subject to NE withholding. However, this does not determine the wage amount that must be included on the Form W-2 as NE wages.
New Jersey	Yes (report wages), unless withholding required by state where services are preformed equals or exceeds withholding required for NJ. However, if NJ withholding is greater, the employer must withhold the difference.	Yes, but see reciprocity.
New Mexico	Yes (report wages).	Yes, if the nonresident works in NM for 16 days or more in the calendar year.
New York	Yes, allowing a credit for withholding taken for the state and/or locality where services are performed (report wages). Unemployment insurance rules of coverage are followed to determine withholding and what wages to report and the state they should be reported to. Report all wages on Form W-2 but do not send them to the state; report all wages on 4th quarter Form NYS-45. NYS wages on Form W-2 must equal federal (box 1) wages. The employee will allocate his/her NYS wages when filing the NYS personal income tax return.	Yes. If a nonresident works only a short period of time in NYS and it is reasonably expected that the total wages for the services performed there will not exceed the amount of the employee's personal exemptions, the employer need not withhold NYS personal income tax until the aggregate amount paid to the employee exceeds the amount of the employee's personal exemptions (20 NYCRR 171.6(b)(4)). *Note:* Withholding is not required for nonresidents assigned to a primary work location outside of NYS if they work in NYS 14 or fewer days in a calendar year; wage reporting still required. Any part of a day spent performing services in NYS counts as a full day, but days spent in NYS for job-related training do not count as days. The 14-day rule does not apply to payments made to nonresidents who are traveling salespersons, public speakers, athletes, and entertainers, or to payments of deferred compensation or nonstatutory stock options.

WITHHOLDING ON RESIDENTS AND NONRESIDENTS		
State	**Residents: Withholding Required on Services Performed Out-of-State (and W-2 Wage Reporting Requirement), If Nexus**	**Nonresidents: Withholding Required on Services Performed In-State**
New York *(cont.)*		NYS state wages on Form W-2 must equal federal (box 1) wages. The employee will allocate his/her NYS wages when filing the NYS personal income tax return.
North Carolina	Yes (report wages), unless withholding is taken for the state where services are performed (do not report wages).	Yes
North Dakota	Yes (report wages), provided the employer's main place of business is in ND and the wages are subject to federal income tax withholding. However, if withholding is taken for the state where services are performed, do not withhold (do not report wages).	No, if nonresident works less than 21 days during the tax year in ND and resident state does not impose an income tax or provide substantially similar exclusion (does not apply to athletes, entertainers, persons of prominence, construction service employees, and key employees). Also, see reciprocity.
Ohio	Yes (report wages).	Yes, but see reciprocity.
Oklahoma	Yes (report wages).	Yes, if the nonresident earns $300 or more in a calendar quarter.
Oregon	Yes (report wages), unless withholding is taken for the state where services are performed (report wages).	Yes, if the employee's OR earnings for the year will equal or exceed the OR standard deduction amount for his/her filing status.
Pennsylvania	Yes (report wages), unless withholding is taken for the state where services are performed (report wages).	Yes, but see reciprocity.
Rhode Island	No	Yes
South Carolina	Yes (report wages), unless withholding is taken for the state where services are performed (report wages).	Yes, if the employee is paid $800 or more per year. *Note:* Nonresident employees of an out-of-state employer who perform disaster or emergency-related work during a declared disaster period that occurs during fiscal year 2013-2014 (7-1-13 to 6-30-14) are not subject to withholding.
Utah	Yes (do not report wages).	Yes, unless the employer receives an exemption from the Tax Commission (generally granted to employers doing business in the state for 60 days or less in the calendar year).

WITHHOLDING ON RESIDENTS AND NONRESIDENTS		
State	**Residents: Withholding Required on Services Performed Out-of-State (and W-2 Wage Reporting Requirement), If Nexus**	**Nonresidents: Withholding Required on Services Performed In-State**
Vermont	Yes, allowing a credit for withholding taken for the state where services are performed (do not report wages).	Yes
Virginia	Yes, allowing a credit for withholding taken for the state where services are performed (employee must submit Form VA-4B, *Virginia Employee's Credit for Income Taxes Paid to Another State,* to the employer).	Yes, but see reciprocity.
West Virginia	Yes (report wages).	Yes, but see reciprocity. If the nonresident works entirely within WV, withhold from all wages paid to the employee.
Wisconsin	Yes (report wages).	Yes, if the annual WI earnings are expected to be $1,500 or more.

Resident and Nonresident Withholding



Neither Connecticut nor Rhode Island have reciprocal agreements with any other state. RI requires withholding from nonresidents who work within its borders. CT requires withholding from wages of its residents for services performed in another state (assuming the employer has nexus), allowing credit for the other state's withholding. Withholding should be taken first for RI. If the employer has nexus in CT, and CT withholding on the same wages would be a higher amount, withhold the difference for CT. Report wages on Form W-2 (see p. A-1) for RI and CT.

Mr. BACHUS. Thank you, Ms. Brown.
Mr. Carter?

TESTIMONY OF PATRICK CARTER, DIRECTOR, DIVISION OF REVENUE FOR THE STATE OF DELAWARE, ON BEHALF OF THE FEDERATION OF TAx ADMINISTRATORS

Mr. CARTER. Chairman Bachus, Ranking Member Johnson, and Committee Members, the Federation of Tax Administrators appreciates this opportunity to appear before you on H.R. 1129, the "Mobile Workforce State Income Tax Simplification Act of 2013." The Federation of Tax Administrators is an association of the principal tax and revenue collection agencies in each of the 50 states, the District of Columbia, and the cities of New York and Philadelphia.

The FTA has long opposed the Mobile Workforce Act as currently drafted because we believe that it will interfere with the states' ability to impose and enforce state income taxes and will lead to additional tax evasion and a loss of revenue to those states.

Forty-one states and the District of Columbia, the cities of New York and Philadelphia, and a number of other local governments impose income tax on the individuals who perform services as employees in their states whether or not those individuals are residents. In this way, the states and the Federal Government impose income tax in the same way. This method of taxing income at the source where it is earned is common internationally as well. If this was not the case, individuals could avail themselves of a country or a state's economic marketplace without paying for that tax benefit, and could do so in competition with the state's residents and in-state businesses.

The 30-day threshold, while less than proposed in the original legislation, still amounts to a full 6 weeks of work, which is greater than most states with statutory thresholds as currently allowed and described in much of this testimony. This is a significant departure from taxing income at the source.

Most importantly, this bill as currently drafted may have a significant negative impact on the states. The State of New York alone estimates that it would experience a revenue loss in excess of $100 million annually as a result of H.R. 1129. While supporters claim that for states other than New York H.R. 1129 is neutral, the states do not believe this will be the case for a number of reasons.

First, states already experience concerted tax avoidance by taxpayers seeking to source income to one of the nine states that do not impose a broad-based individual income tax.

Secondly, while states, like the Federal Government, require employer recordkeeping, reporting and withholding of tax from employee wages as the primary mechanism to ensure tax compliance, H.R. 1129 limits states' ability to require employer recordkeeping, reporting and withholding. Studies done over the years by the IRS and the states show that where there is no information reporting or withholding, taxes can be under-reported by over 50 percent.

H.R. 1129 undercuts those important recordkeeping, reporting and withholding mechanisms that the states need and depend upon to enforce their income taxes by allowing employers to rely not on their own records but on the estimates made by an employee a year in advance as to where the employee expects to be working for the coming year. While employers may not know where their employees are every day of the year, I find it incredulous that the employee is better informed of where the employer will be sending them during an entire year in the future than the employer is themselves.

Thirdly, while H.R. 1129 excludes from its provisions certain individuals—professional athletes, professional entertainers and public figures—it does not exclude highly-compensated individuals. In effect, it does not matter how much an individual might be compensated for services performed in a state. This is important because many highly-compensated individuals travel to a location for a short period of time due to the nature of their work and earn significant revenue for their employer and themselves.

Examples in Delaware of very highly-compensated non-resident attorneys representing large corporations before Delaware's Chancery Court on business matters.

Lastly, H.R. 1129 contains provisions and terms that are ambiguous and poorly defined, and as a result will ultimately lead to differences in the ways the states interpret and apply these provisions. In my experience, unless provisions are more properly defined, it will lead to more dispute and litigation and not less.

Despite the fact that the FTA believes that the states currently impose by statute or regulatory policy appropriate *de minimis* rules and do not seek to enforce withholding or tax on limited activities of employees in a state, still we have worked with the Committee staff and industry representatives for almost a decade on this legislation. Seeking a balanced solution to tax enforcement concerns and business compliance requirements, the states have proposed a solution to be enacted by state lawmakers which we believe will be preferable because it would allow states to ensure and retain the ability to audit and verify the withholding as correct using employer records, while a threshold would limit the imposition of withholding on tax for employees traveling into the state for less than 20 days. This solution may not have had the support needed to make it a reality because, in part, industry groups have focused their efforts instead on this Federal legislation.

Therefore, we continue to ask the Members of this Committee to consider the needs of tax administrators to be able to make sure that taxes due are paid and balance the interests of the citizens of your state with those of the business community.

Thank you, Mr. Chairman, Ranking Member Johnson, Committee Members.

[The prepared statement of Mr. Carter follows:]

Statement of
Federation of Tax Administrators

Before the
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Of the
House Committee on the Judiciary
In the
U.S. House of Representatives

H.R. 1129
Mobile Workforce State Income Tax Fairness and Simplification Act of 2013

April 29, 2014

Patrick Carter
Director, Division of Revenue for the State of Delaware
Past President, Federation of Tax Administrators

Mr. Chairman and Members of the Subcommittee:

The Federation of Tax Administrators appreciates this opportunity to appear before you on H.R. 1129, the Mobile Workforce State Income Tax Simplification Act of 2013, a bill that would limit the ability of state and local governments to impose and enforce existing income taxes on individuals working in multiple states. I am Patrick Carter, the Director of the Division of Revenue for the State of Delaware and also a past president of the Board of Trustees of the Federation of Tax Administrators.

Introduction

The Federation of Tax Administrators (FTA) is an association of the principal tax and revenue agencies in each of the fifty states, the District of Columbia, New York City and the City of Philadelphia. Our purpose is to improve the practices and standards for tax administration through research, information exchange, training programs and by representing the interests of state tax administrators before Congress and the federal executive branch.

The general position of the Federation with respect to this legislation is embodied in Resolution 2012-2, adopted by the membership at its 2012 Annual Meeting in Washington, D.C. A copy of the resolution is attached as an addendum to this testimony.

Primary Basis for the FTA's Opposition to H.R. 1129

FTA opposes enactment of H.R. 1129 as introduced for a number of reasons, the most critical of which are:

1. H.R. 1129 runs directly counter to a fundamental, underlying principle of income taxation – namely that income should be taxed where it is earned or where the services giving rise to the income are performed. This is the principle on which the federal government's own individual income tax is based, as well as the income taxes imposed by states. Abrogation or abandonment of this "source" principle will allow individuals to avail themselves of a state's economic marketplace without paying for that benefit (in competition with that state's residents and instate businesses).

2. The 30-day threshold, while less than proposed in earlier versions of the legislation, still amounts to a full six work-weeks, which is greater than what is currently allowed by most states with statutory thresholds. Quoting from the dissenting views in the report of the Judiciary Committee on the 2011 version of the legislation, the 30-day threshold is "excessive," "goes too far," and will lead to "severe state revenue losses."

3. The State of New York alone estimates that it would experience a revenue loss of $106 million annually as a result of H.R. 1129.

4. Supporters claim that for states other than New York, H.R. 1129 is "neutral," arguing that tax not withheld or paid in one state will be withheld and paid in another. However, states with income taxes already experience enforcement difficulties when taxpayers claim to have changed domiciles (when in fact they have not), attempting to shift income to one of the nine states that have no broad-based individual income tax. H.R. 1129 will provide similar opportunities for workers who reside or work in non-tax jurisdictions to improperly shift income into those jurisdictions from other taxing jurisdictions where the income is actually earned.

5. Most states, like the federal government, rely on income taxes to fund important governmental functions. And just as the federal government does, states require employer recordkeeping, reporting and withholding of tax from employee wages as the primary mechanisms to ensure tax compliance. H.R. 1129 limits states' ability to require employer recordkeeping, reporting and withholding. Studies done over the years by the IRS and reported to Congress, as well as studies by the states, show that employer withholding and information reporting is essential to minimizing the "tax gap" (the amount of underreported taxes that would otherwise result). Most recently, the IRS reported that income subject to withholding and information reporting, combined, is on average underreported by only 1 percent. Income subject to neither withholding nor information reporting is on average underreported by 56 percent.

6. H.R. 1129 undercuts the important recordkeeping, reporting and withholding mechanisms that the states need to enforce their income tax statutes by allowing employers to rely, not on their own records, but on a one-time estimate made by the employee, a year in advance, as to where the employee expects to be working for the coming year. At best, such employee estimates are unlikely to be reliable. At worst, employees are offered an incentive to make inaccurate estimates — for example, when an employee who resides in a non-tax state travels to states that impose income taxes. Under H.R. 1129, states could not require an employer to keep records to show where its employees actually worked, leaving state tax administrators with little means to verify whether employee estimates are accurate.

7. While H.R. 1129 does not apply to certain individuals (professional athletes, professional entertainers and public figures), it does not exclude highly compensated individuals. The bill ignores how much an individual is compensated for services performed in a state.

8. H.R. 1129 will also create situations in which individuals in relatively similar situations are treated substantially differently for state income tax purposes. For example, employees and independent contractors will be subject to different rules (federal versus state-level thresholds). Employees from states without an income tax who work in another state but do not exceed the proposed 30-day threshold will pay no tax to any state, while employees from states with an income tax who do likewise will presumably pay tax to their home state on the income earned in the other state.

9. H.R. 1129 contains provisions and terms that are ambiguous, which may lead to litigation and ultimately lead to differences in the ways that states interpret and apply the rules. For example, the bill uses the term "employment duties" but does not define that term. This term is critical to counting days toward the 30-day threshold and is likely to be subject to dispute in cases where an employee may stay in the state for some period, but may claim not to be performing "employment duties" during the entire stay.

10. If, as the states fear, H.R. 1129 results in manipulation or abuse by some individuals, states will have to increase enforcement efforts in this area. This may lead to additional time and resources spent on audits or investigations, perhaps directly focused on individual employees, or on other administrative alternatives necessary to supplement the lack of employer recordkeeping, reporting and withholding.

11. Finally, H.R. 1129 represents a substantial intrusion by the federal government into state sovereignty.

FTA's Involvement with the Issues Addressed in H.R. 1129

Employees and employers have always been required to keep records to comply with state and local income tax reporting and collection regimes. (Similar requirements are imposed under the federal income tax system for employees who claim non-taxable travel reimbursements or who spend periods of time working overseas.) As workers travel more, states understand that these requirements will affect more businesses, and may pose a relatively higher burden on small businesses.

But as with all types of enforcement, states are not generally concerned with de minimis activities. Most have explicit or implicit thresholds that they have adopted by law or regulatory policy. Nor is H.R. 1129 limited to smaller employers and businesses, but would apply to any employer regardless of the size or the sophistication of its recordkeeping systems. In addition, records may still be required for other accounting, federal tax, travel reimbursement or employee benefit purposes. (Note that, while these exist, employers will not have to use those records for state withholding under the bill). Moreover, improvements in information technology have greatly lessened the burden of recordkeeping for tax reporting purposes and such improvements are likely to continue.

Nevertheless, the states and the FTA have worked with the Committee's staff and industry representatives for almost a decade on this legislation, seeking a balanced solution to tax enforcement concerns and business compliance requirements. The states have proposed a solution to be enacted by state lawmakers which we believe would be preferable, but this solution may not have had the support needed to make it a reality because, in part, industry groups have focused their efforts instead on this federal legislation.

Conclusion

We ask that Congress continue to balance the interests of the states to make sure that the states can maintain a functioning individual income tax system and that tax liabilities can be properly enforced. It makes sense for Congress to minimize the intrusion into state authority and avoid disruption of state revenue systems. Any solution must be directed squarely at the problem and not create other unintended consequences.

Thank you, Mr. Chairman.

Addendum

Federation of Tax Administrators Resolution 2012-2

(Note that references in this resolution are to a prior version of this legislation.)

Background

The fundamental principle of individual income taxation is that income is taxable where it is earned or where the services giving rise to the income are performed. In addition, the state of a taxpayer's residence may tax all income regardless of where earned, but is generally required to offer a credit for taxes paid to other states to assure that income is not subject to multiple taxation. This is the same tax policy embraced by the U.S. government and by all other income-taxing governments.

As United States work patterns shift to increasingly include interstate commuting, telecommuting and multistate travel, more workers find themselves with tax obligations to more than one jurisdiction. Likewise, employers are faced with an increased responsibility for withholding income taxes for multiple jurisdictions. State and local laws and practices vary with respect to de minimis thresholds for withholding. There also is variance in enforcement programs aimed at compliance among persons (and their employers) that are temporarily in the jurisdiction.

H.R. 1864, the Mobile Workforce State Income Tax Fairness and Simplification Act, passed in May 2012 by the House of Representatives, would authorize a state or locality to impose an income tax liability and a withholding requirement only when a nonresident has performed services in the jurisdiction for at least 30 days in a calendar year. The bill contains an exception for professional athletes and entertainers.

In response to bills introduced in previous Congresses, the Multistate Tax Commission developed a state model mobile workforce statute. The work product reflects input from industry and employer representatives.

In its review of H.R. 1864 and in various discussions with proponents of the bill, FTA made several points:

- H.R. 1864 represents a substantial preemption and intrusion into state tax authority;
- While FTA recognizes concerns regarding the administrative burdens imposed by current practices, the 30-day threshold remains beyond a level necessary to deal with the vast majority of individuals who would be temporarily in a jurisdiction;
- H.R. 1864 would substantially disrupt the current tax system in favor of a system based on taxation by the resident jurisdiction;
- H.R. 1864 would substantially disrupt the revenue flows in certain states, particularly New York State;

- A simple "days threshold" will expose some jurisdictions to substantial revenue disruptions, so a "dollar threshold" that would limit the exposure of the states should also be applied.
- Independent state action is a viable and preferred substitute for federal legislation.

Policy

The ability to tax income where it is earned is fundamental to state tax sovereignty and state and local income tax systems. Moreover, this ability is absolutely necessary in under our constitutional framework, where a state may choose to not employ an income tax. FTA finds the Act is not an appropriate balance between administrative simplification and adherence to standard tax policies and it inappropriately disrupts state and local revenue flows. FTA does not support the Act as passed by the House.

Congress and the U.S. federal agencies should refrain from enacting measures, taking actions or making decisions that would abrogate, disrupt or otherwise restrict states from imposing taxes that are otherwise lawful under the U.S. Constitution or from effectively administering those taxes. Congress should undertake an active program of consultation with states as it considers measures that would preempt state tax authority. Finally, states should actively pursue such uniformity and simplification measures as are necessary and effective to address concerns of administrative burden in complying with the tax laws of multiple states. FTA will encourage and support uniform actions by states as the preferred solution to issues that prompt federal preemption.

While federal preemption is generally to be resisted, preemptive legislation can, at times, promote administrative issues such as simplification, uniformity, and taxpayer compliance, albeit at some cost to state sovereignty. FTA will evaluate proposed federal legislation that preempts state taxing authority against several criteria. (1) Has the preferred solution of uniform state action been pursued and exhausted? (2) Recognizing that the benefits of federalism will impose administrative burdens on commerce, is there disinterested evidence that the administrative burden and complexity posed by current state and local practices is impeding the growth of commerce? (3) Does the proposed preemption address administrative issues such as simplification, uniformity, and taxpayer compliance? (4) Can meaningful simplifications and uniformity be achieved through state action? (5) Would preemption disrupt state and local revenue flows and tax systems? (6) Would preemption cause similarly situated taxpayers to be taxed differently -- specifically, does the proposal create advantages for multistate and multinational businesses over local business? (7) Does the preemption support sound tax policy? (8) Does the preemption create unknown or potential unintended consequences? (9) Have state tax authorities and taxpayer representatives together agreed to a beneficial change in federal law? (10) Does the proposed preemption materially narrow the scope of state laws?

In addition, FTA makes the following specific comments on the Act and similar legislation:

Coordinated state action should be pursued and exhausted.

Federal legislation should not proceed until proponents of the Act have worked with New York State officials to resolve the fiscal impact on that state.

If Congress elects to take action in this area, any resolution of the issue should, at a minimum, meet the following criteria:

- The action should be clearly limited to wages and related remuneration earned by nonresident employees. The legislation must also be clear that it is not intended to impair the ability of states and localities to tax non-wage income earned from the conduct of other economic activities in the taxing jurisdiction.
- The action should provide that a state or locality may impose income tax liability on and a withholding obligation with respect to the wage and related remuneration of a nonresident if the nonresident is present and performing services exceeding a de minimis threshold in a calendar year.
- Alternatively, the threshold could be formulated as limiting state and local income taxation (and withholding) to those nonresidents present and performing services in the jurisdiction whose earnings exceed a de minimis threshold in wages and related remuneration in the prior year.
- The action should provide that all persons paid on a "per event basis" are excluded from the coverage of the bill.
- The action should provide for the allocation of a day to a nonresident jurisdiction when services are performed in the resident jurisdiction and another jurisdiction in a single day.
- The action should cover wages and remuneration earned within a jurisdiction in a calendar year so as to not disrupt taxation of any deferred amounts. It should not, however, impair the ability of states and localities to tax income arising from the conduct of other economic activities in the taxing jurisdiction.
- The effective date of any action should be delayed until the beginning of the second calendar year following enactment to allow sufficient time for implementation by state and local governments and affected employers.

This discussion should not be interpreted to imply that FTA considers that a physical presence standard is in any way an appropriate standard for establishing jurisdiction to tax in other contexts, particularly for the imposition of business activity taxes on entities doing business in a state. FTA is firmly opposed to federal legislation that would establish a physical presence nexus standard for the imposition of business activity taxes.

This resolution shall be in effect for three years from the date of enactment unless replaced by a subsequent resolution.

Mr. BACHUS. Thank you, Mr. Carter.

At this time I recognize the gentleman from Pennsylvania, Mr. Marino, for 5 minutes of questions.

Mr. MARINO. Thank you, Chairman.

I have three Committee hearings going on simultaneously, so I am going to try and get to each one, but thank you.

Mr. BACHUS. Many Members of the Judiciary do indeed have two hearings going on simultaneously.

Mr. MARINO. Three.

Mr. BACHUS. Three.

Mr. MARINO. All right, let's get right to the meat of this.

Does anyone on the panel working in different states get paid by a company in one state? Anyone on the panel make any of these moves to other states and work? Okay. So that means that you are not paying multiple taxes to multiple states; correct?

Ms. BROWN. Correct.

Mr. MARINO. No one is paying a state tax in several states. You are all paying in one state.

Mr. PORTER. Correct.

Mr. MARINO. Okay. I guess let's start with Mr. Carter. Can you give me any reason why it is fair to an employee who lives and primarily works in one state but travels to another state for whatever period of time and pay a tax on that? And let me preface that—let me follow up with that question by my position.

I am sick and tired of hearing the Federal Government primarily and the states say we have to increase revenues, and it is always on the backs of hard-working, tax-paying Americans, okay? It is about time that the Federal Government, especially the Federal Government, and states start cleaning their act up.

I worked in industry. I worked in a factory until I was 30 years old, started sweeping floors, and I know how hard it is to work in a factory. I know that there are no wealthy people working in a factory, even people who have to travel to another state, and let me give you an example.

I was in the baking industry, and when we would build factories, employees from the companies that built the machinery from other states would come into our state and put that machinery together. They weren't millionaires by any stretch of the imagination, and they certainly were not well off. They were making ends meet, just like I did. But unfortunately for them, they had to leave their families and go to another state.

Now, can anyone—but we will start with Mr. Carter—tell me why it is fair for a person to pay multiple states?

The Federal Government and the states better get their acts together. They had better start decreasing the size of government. They had better start becoming more effective and more efficient in running governments, because if that were the way my business was run when I was in industry, it would have been shut down, and those elected, those appointed would have been fired a long time ago.

Fewer people, more responsibility, and I am tired of hearing more revenue on the backs of hard-working, tax-paying Americans.

Mr. Carter?

Mr. CARTER. Committee Member, the primary reason why states believe or I believe—let me say I believe—that a non-resident individual should be subject to taxation in that state where they are engaged in business activities is they are availing themselves of the assets of that state, the roadways. If they get injured, the court system. If they are accosted by someone, they use the police force. All that is funded by that state while they are working.

Mr. MARINO. Okay. Now I am going to bring out my prosecutorial experience. I was a prosecutor for 18 years.

I am driving through State x, driving through it, and I am using the road, and there are no tolls. Should I be paying some type of tax for using it? Don't I do that with the Federal Government? And aren't many roads in states funded by the Federal Government? Number one.

Number two, we have a Constitutional right to be protected in this country by law enforcement no matter where we go.

So you are not going to sell me on why a state should be able to tax someone. Maybe the state has to get its act together and start running efficiently like my business ran.

Anyone else?

Mr. PORTER. Well, I will just concur. I see typically this in my practice. I represent contractors and construction companies, and also construction workers, and I can tell you that it creates a great deal of complexity within the company systems, it creates a great deal of complexity for the individuals as they have to file their tax returns. At the end of the day, they usually get credits back to offset, and the net effect for them is many times minimal, but it does create additional complexity.

Mr. MARINO. Well, let's step aside of the complexity and the ridiculous paperwork that government is known for. It is simply not fair to hit someone two times, three times, four times because they happen to work in that state.

That individual, Mr. Carter, with all due respect—I am not aiming this at you, sir; please don't take it personally. But I am just as passionate on this side of it as you are on your side of it. But that individual is providing a great service for that state also.

Ms. Brown?

Ms. BROWN. Agree, agree. And I would just like to add on to that, that generally speaking we are not talking about the executives. Those aren't the ones that are walking into our offices with the questions and with the confusion. Most of our workforce do not understand these laws. So I am forced to explain this to them and explain to them why New York is different from California, and California is different from the next to the next, and all they want to do is they just want to do a good job and get the paycheck that they expect to receive.

Mr. MARINO. And it is not the person walking into your office who is a top executive where that tax may be being paid for by the company. It is an individual that primarily is living from paycheck to paycheck, trying to raise a family and send kids to college. Believe me, I have been there, I know what it is like. I do not agree with this whatsoever of being taxed by multiple states. One state, where you live, that is it. Thank you.

Ms. BROWN. Agree.

Mr. COLLINS [presiding]. The Chair now recognizes the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Carter, do you agree that there is a problem that this bill addresses?

Mr. CARTER. Ranking Member, personally I do think it is very difficult for employers to keep track of some employees, especially when there are states such as Delaware where the *de minimis* number of days is 1 day. An example I use and that was mentioned is utilities. There may be, especially here on the East Coast as utility companies tend to be regional, where one of the employees of the utility may be working in a state which is their primary area of responsibility, and they are sent into Delaware for a day or a week to do work there. The manager of the operation isn't a tax expert, probably not talking to the payroll department all the time, and they are totally unaware of the different laws in the different states. So I do recognize that there is an issue here.

I do think that 20 days, a 20-day period, which is a full month of work, as a bright-line test that you can send to all of your employees and tell them if they are working somewhere for more than 20 days, check with the payroll department to see if you are subject to tax, is a very bright-line test that can be used nationally.

Mr. JOHNSON. So is 30 days.

Mr. CARTER. So is 365. I do think 20 days is a lot of time to be working in your state, and I mentioned to Representative Marino that they are availing themselves of the state resources, and they should be, in my belief, subject to taxation in that state.

Mr. JOHNSON. All right.

Ms. Brown?

Ms. BROWN. Thirty days is all-inclusive. So it is not business days. It doesn't exclude certain days. So it is really important to home in on the fact that the 30 days is 30 days from when that person steps into the state for 30 days forward.

Mr. JOHNSON. Mr. Carter, if that is what the legislation says, do you still have a problem with that?

Mr. CARTER. As I stated in my testimony, I have issues with some of the definitions of how it would work. I think what you would see happening, because I don't think this is as clearly defined as Ms. Brown, at least in our mind, that you would see regulations issued by individuals such as myself, tax commissioners, trying to find that 30-day period.

What happens if someone comes in on January 1st and then they don't come back until August 1st? That is a 30-day period from start to finish, and they have only been in our state for 2 days.

Ms. RIEHL. Congressman Johnson?

Mr. JOHNSON. Ms. Riehl?

Ms. RIEHL. I just want to make clear that that has been a long-established change to the legislation from when you originally introduced it. The definition of a non-resident day is any fraction of any day. So that has been long established. There was actually a discussion that occurred with Committee staff between the hearing in the last Congress and the move to the full floor, one of the clarifications that was made. When we say a day, it is any fraction of a non-resident day.

Mr. JOHNSON. All right.

Anything else, Mr. Carter?

Mr. CARTER. No, Ranking Member.

Mr. JOHNSON. All right. Thank you.

Anyone else have anything to add?

[No response.]

Mr. JOHNSON. I think you all have been quite explicit in your reasons for supporting the bill, and also for opposing it. So I would have no further questions, and I would yield back the remainder of my time.

Mr. COLLINS. Ms. DelBene?

Ms. DELBENE. Thank you, Mr. Chair.

I come from a state, Washington State, where we don't have a state income tax. Many of our state's residents travel frequently for business and currently face the confusing patchwork that many of you described of non-resident state income tax filing rules. Despite living in a state with no income tax, residents of my state may be legally required to file an income tax return in every other state in which they travel for business, in some cases even if they were there for only 1 day, as many of you have talked about.

I do think Congress can play a role in alleviating the difficulties facing these individuals and families in our current system, and I believe that we should, and that is why I am a co-sponsor of this legislation.

That said, I am very mindful of the concerns being raised regarding state sovereignty and potential impacts to state revenue, and I am pleased that supporters of the bill have been open to changing the bill over the years to address these concerns.

I wanted to ask in particular Mr. Porter, your testimony discussed the variety of businesses, large and small, who are impacted by the current state of affairs. Particularly for small businesses, and we have talked about this a little bit, can you talk about the compliance burden on these businesses? For example, in what number of states are non-resident employees subject to tax withholding on the first day of travel, or a small business that doesn't have much employee travel? How much are their expenses in terms of preparing the paperwork necessary to comply with these rules, versus the actual taxes that are paid?

Mr. PORTER. Sure. I mean, when you are thinking about small business, you are, first off, looking at businesses that traditionally don't have a large staff, they don't have a large payroll department. So many times, at least what I see in my clients' practices, you have one person that does the payroll. So they are doing payroll, and they are probably doing payables, and they are doing a lot of other types of things.

So it does become overwhelming to track. In particular, I think in my practice I had a construction client that many times would take a job in a power plant that did a shutdown for two or 3 weeks, and they may have 500 or 600 employees that would suddenly go up and that would be working through the union hall at that one particular site, and they are going to have to gear up and do that and get all the multi-state issues going, and it becomes very problematic.

So the alternative is to out-source it, which is one alternative to do. But many out-sourcing payroll entities, they don't necessarily track things by days. They are more inclined to track by pay periods. So it is very confusing. It is very challenging, and it is also very challenging for those employees who are in those environments and then go to people like me to fill out their tax returns at the end of the year.

I think I used in my testimony the example of an electrical lineman. It is not unusual as you hear thunderstorms, like we are having today, and they move through the area and they knock out power, then these gentlemen and ladies will come in and do that work and find that they have to file a tax return in this area. Then they have to file a tax return in this area for the next storm.

So it is very challenging, and it is very confusing for them.

Ms. DELBENE. How many states start withholding after the first day? Do any of you know the answer?

Ms. RIEHL. The majority.

Ms. DELBENE. And I assume for a lot of small businesses where they might only have a couple of employees who might be impacted by this, the cost of administration in terms of filing is much more than any taxes that are paid to states.

Ms. Brown, you are shaking your head?

Ms. BROWN. Yes, I agree.

Ms. DELBENE. Do you have an idea of what those costs might be relative to——

Ms. BROWN. So, for instance, part of my testimony is that I have worked with an employer who had about 1,400 employees. They were in about nine states. We had to hire outside legal counsel, outside tax counsel. We had to hire registered agents in the states. We had to pay for tax preparation services for the number of employees that were affected.

And on top of all of that, I think that a priceless piece of it is the employee morale and the employer-employee relationship. We are being compliant. Maybe companies that they worked for previously had not been or didn't have the resources available in order to withhold properly. So then we are looked at as the bad guy almost. So I think that is a real priceless cost that the employer takes.

Ms. DELBENE. Ms. Riehl, you talked about voluntary efforts for voluntary compliance in the states and that those haven't taken hold. I wonder, Mr. Carter, if you think that there is a potential to move that forward since it looks like those efforts haven't really gained any traction so far.

Mr. CARTER. Representative DelBene, I think it is a challenge personally. It was mentioned that North Dakota has adopted model legislation, but only with the caveat that other states will adopt model legislation. If I use my state, Delaware, as an example, we do not have any reciprocal agreements with the surrounding states of Pennsylvania, New Jersey and Maryland. If we were to adopt this type of legislation for our state and the other states did not adopt it simultaneously, we definitely would see a loss of revenue to those non-resident employees who are working in Delaware, and that is the challenge, to try to at the same time get the surrounding states to adopt the legislation at the state level.

Ms. DELBENE. So it sounds like you are not feeling confident that there is going to be a voluntary solution.

Mr. CARTER. I am not.

Ms. DELBENE. Okay.

Thanks to all of you for being here. I appreciate it, and I yield back.

Mr. COLLINS. I thank the gentle lady.

I tell you what. In light of votes that are going on, I am going to begin my question series, and I have just a few questions, and we are going to take a short recess for that. So anybody else who wants to go ahead and do their vote, we will pick back up—either myself or the Chairman will pick back up when we get back.

So, with that public service announcement, then I have a couple of questions.

Ms. RIEHL AND MR. Porter, I have a hypothetical, and this is something that if things come along and they are just—frankly, something about this whole situation just strikes me wrong. Mr. Carter, we have a gentleman's disagreement on this, but I understand. I come from a southern state, worked on the state legislature. I get the fact that states and cities are becoming tax starved. I get that.

But this is just a hypothetical, and it goes a little bit to your employment duties, wording classification, which I did read your written testimony. I work for the University of Georgia, or I worked for, as I used to in a previous time, I worked for a church. I take a leave of absence, which is not a leave of absence but a sabbatical, which happens in higher education but also in churches or other organizations as well.

I go to a state that begins supposedly on Day 1 collection. I go there to research a book that I am going to write, to pray, to meditate, to just get away for 4 months.

Under this bill, would what I am doing classify as a vacation or employment? It is a hypothetical. I am a lawyer, too, so this is——

Ms. RIEHL. I think in that scenario, Congressman, that sabbatical which is paid for would be treated just like it would if you were on paid vacation. But if you do work on a vacation day and that somehow is tracked or traced by yourself in recordkeeping, a lot of that has to do with how you would account for that time. If it is counted against your time off of work, or if it is not counted against your time off of work, you are still being paid.

Mr. COLLINS. Most sabbaticals would not be counted against my time off of work. It would just be counted as a time to go take time off, to read, to do stuff that doesn't apply to my job.

Ms. RIEHL. Exactly.

Mr. COLLINS. Mr. Porter, do you have anything to add? Because I have a follow-up as well.

Well, the follow-up I have here is what is to keep—Mr. Carter or Ms. Brown, jump in here whenever you want. What is to keep states, then, from saying that any time I go into a state for a vacation in which I take a call from work, that is a taxable day?

Ms. RIEHL. Technically, it is.

Ms. BROWN. Technically, it is.

Mr. COLLINS. That is a bunch of bull. [Laughter.]

We have another term for it in Northeast Georgia, but I am among mixed company and I am a southern gentleman. My mother would shoot me.

But I think the issue here is that we are really beginning to see an issue here that is very disturbing. I appreciate the authors' intent here, and I think it is something that needs to move forward in looking at how we deal with this. But there are some issues on when this applies and how this applies.

Frankly, the Federal Government is a little bit hypocritical about this because I am in the military as well. Georgia is my state of residence. I can PCS anywhere in the world or any other place in the country and I am going to be taxed in Georgia. And now the Federal Government is coming in to say basically states who want to tax you to death, you are going to get your taxes no matter where you are claiming residency, and I think the 30 days to me is a little, frankly, arbitrary in a sense, and I think we are working on it. I know my good friend from Georgia has worked on this very hard.

Is there a better way to look at this? Two questions. Does the Federal Government have to jump in on this? Number one. And number two, is there a better way to sort of define some of the problems and issues that I brought up?

Ms. RIEHL. I would say that the Federal Government has to act here, and Congress has the authority to do it, because of the nine states that do not have a personal income tax. They cannot pass a law in the State of Washington that would protect their employees when they travel to Georgia. Only Congress can do that. And by setting a new standard of 30 days when you cross state lines in any one given state, we just think that is a new starting point. It doesn't bar the state from expecting to have a portion of your earned income paid there, but only after 30 days in a calendar year.

In this instance, when personal income tax laws were passed, people didn't travel beyond their home city or county, but that is just not common these days. This workforce that we all are in right now is much more mobile, and as Lori described in her testimony, it is middle management, it is folks at entry level that are moving around for work, and they are being subjected to this.

Mr. COLLINS. Again, the concern here is that if we go ahead with this step—I am looking down the road, and my hypothetical sort of highlighted this—we have now condoned this and we have set up a standard, and then maybe through vague terms or different states deciding we need more money, that phone call back from the office on a vacation now becomes a taxable day, and I don't think that is a good move.

Ms. RIEHL. We could certainly move to no non-resident implications for tax where all you do is pay that to your home state 100 percent of the time. And certainly residents of states that don't have a personal income tax would not owe a penny to a state regardless of how much time they spent there.

Mr. COLLINS. And I know, Mr. Carter, you brought that up, saying that is not fair. Well, frankly, every state has to determine how they want to collect income, and if they choose not to have an income tax, then that is more the reason they can—that is a state choice that they have made, and if another state doesn't like it, then they can go to a state non-income tax as well.

Mr. CARTER. That is a potential option, but in reality the states are structured to raise their income for the way they are. As you just said, your State of Georgia is a personal income tax and a sales tax. Delaware has no sales tax but a little bit higher personal income tax.

Mr. COLLINS. I think what we have raised here is just a lot of questions that could go on.

We have to go vote. So, at this point the Committee will stand in recess, subject to the call of the Chair.

[Recess.]

Mr. BACHUS [presiding]. The Subcommittee will come to order.

I yield myself 5 minutes for questions.

Before we left, I was listening to an exchange between Mr. Collins and Mr. Carter in which you were talking about how unfair it was if someone was in a state utilizing their services that they should pay taxes to that jurisdiction because that jurisdiction was providing services, and you were including all taxes, income taxes.

I was thinking about, just hypothetically, if I went to New York City, which I did Sunday, and spoke, but let's just say I went there for a month or 2 weeks to work. When I got to the airport, I would pay an airport tax. When I got in a cab, there is a tax there. When I got to the hotel, I would pay a pretty steep lodging tax. So my shelter would be as much as—and I don't know what the tax is on hotel and motel rooms. But if I am not from there, I am going to be staying at a hotel or a motel, so I am going to be paying a pretty steep tax there. Anything I buy, I am going to pay a sales tax.

I did ask my staff to print out—I would pay a 4.5 percent New York State sales tax and a 4 percent New York sales tax. The only exemption would be if I bought a pair of shoes.

Now, the whole time I am there, my five children would be in school in Alabama. I would have a home in Alabama. My garbage would be picked up in Alabama. If there was a fire at the hotel, I don't own the hotel or motel in New York. So if there were firefighting services, that is provided. That benefits—I mean, a hotel owner pays that, but I am also paying because I am paying a lodging tax. But back home, they are getting none of that. They are providing free police protection, fire protection, sanitation, garbage pickup.

But more importantly, they are paying for the education of my children, which is a major expense. But if my income tax is going to New York and my children are being paid for teachers in Alabama, that just doesn't seem fair. I hadn't really thought about it, but if anybody had a claim, even when I am in New York, I am paying a lot of taxes in New York.

If you take the income tax and pay that, too, I am paying almost nothing to Alabama, but it is 80 percent of what I am benefitting from.

We talk about emergency workers. One of my questions I think kind of fits right in. Natural disasters such as flood, fire, earthquake, tornado, wind storms affect thousands of people every year. According to FEMA, since 2010 we have averaged 87 major emergency declared disasters every year. At times, disaster impact states rely on a workforce, plus volunteers too, from all over the country to help restore critical infrastructure such as telecommunication networks and electrical grids. It doesn't say it here, but they also come in and provide claims processing to reimburse people for their lost houses, lost cars, other insurable loss. We want to encourage that. I don't really want to deal with somebody over the Internet, and I am afraid that if this workforce is in any way discouraged from coming in because, all of a sudden, all their taxes go to the state, and they are there, even as volunteers—you know, I thought about this. When they come in as volunteers, the state is getting lodging tax, they are getting when they buy food. They are getting paid for that. Their gasoline. They are paying.

You mentioned roads specifically. Let me tell you, if they buy gas or they go into an airport, believe you me, they are paying. So I am not sure that, the more you think about that, the more—you know, police come in from other states, fire responders, fire trucks. They loan equipment to them. They gas up. But they are there for the sole benefit of those people who are hit by whether it is Katrina or whatever, 9/11.

But I guess the question that the Committee prepared I think is a good one. How do state and local taxes impact the efforts, and how will this act help Good Samaritans who come into a state to help in case of a disaster, which is probably the biggest influx by far of people?

Mr. Carter?

Mr. CARTER. Mr. Chairman, the Delaware General Assembly actually recently adopted legislation that exempted emergency workers in the State of Delaware for a short period of time. I believe the period is for 60 days if either a state or national disaster is declared.

Mr. BACHUS. Would that include utility workers?

Mr. CARTER. That includes utility workers. Yes, it does.

Mr. BACHUS. How about in New York?

Mr. CARTER. There are eight states that have adopted this legislation. I was just speaking to——

Mr. BACHUS. And those emergency workers still pay their lodging tax.

Mr. CARTER. They would still be, or the company would pay, the utility company. Whether the local utility company reimburses them——

Mr. BACHUS. Somebody would——

Mr. CARTER. Somebody would, yes.

Mr. BACHUS. Those are pretty steep.

Mr. CARTER. It can be in some states, yes.

Mr. BACHUS. I don't know what the New York one is, but all sorts of taxes.

My time has expired.

Mr. CARTER. On the speaking occasions——

Mr. BACHUS. But do you see my point?

Mr. CARTER. I do see your points. But I will say to the speaking engagement, if you were speaking in New York——

Mr. BACHUS. Oh, I am not talking about speaking. That was a poor example.

Mr. CARTER. Okay.

Mr. BACHUS. What I am thinking about, somebody comes in to work for 2 weeks or 3 weeks. I mean, they are going to pay a lot of taxes, but their home state is still providing every service that they benefit. I mean, everything is still—the fire service isn't suspended, and most of them have family at home. But even if they are alone, somebody is protecting that house. Their children, the schools are still being paid for. And if their income tax goes to New York, while I am out of state, my home state is going to lose revenue.

I think that is where you have a lodging tax. I think that is maybe why you have a sales tax. That is why, when you come to an airport—there is even a tourist tax now. If you look at a hotel bill now, there are all kinds of taxes on there.

But I am just telling you that I think there are two sides to that story. I understand your concern. Your concern was fairness. But I am actually saying I think to collect that income tax when they are collecting a 10 percent lodging tax and all your gasoline, all your food, anything you buy, I think they are getting a pretty good deal. And you are providing jobs when you are coming in.

But I just wanted you to think about that. And education is still 50 percent of expenses, I think. It is by far the biggest expense. And income tax in some states, that is their major source. In some states it is not.

Mr. Johnson?

Mr. JOHNSON. If I may——

Mr. BACHUS. Mr. Jeffries. I am sorry. But, go ahead.

Mr. JOHNSON. Yes, I just want to clear the air. This is not a revenue raising bill. This is a bill to bring some uniformity to the 50 states insofar as when income taxes can be levied, and the legislation calls for a 30-day period that must be worked, 30 days, and a day is an increment of activity on a particular day. So if more than 30 days, then the ability of a state to collect an income tax from that traveler who is working in the state becomes effective, but not until we reach that 30-day threshold.

So the reason for this legislation is to create some uniformity and to enable businesses and individuals who actually owe the taxes to have some certainty, as opposed to a hodge-podge of 50 possibilities that they have to pay money to research as a consumer to find out where they are liable for income taxes, or for a business, a small business having to track all 50 states insofar as when income taxes have to be collected in accordance with that particular state's laws. That is very burdensome, and it puts us at a competitive disadvantage as a nation with respect to our businesses.

So this is to not create any kind of double taxation or deprive any particular state of the ability to collect income tax.

So I just wanted to make those points, Mr. Chairman, and I thank you.

Mr. BACHUS. Mr. Jeffries is recognized for 5 minutes for questions.

Mr. JEFFRIES. I appreciate the return to regular order as I did have some issues that I wanted to be able to address.

I don't doubt that this legislation has been introduced in good faith by individuals who are supporting it, both sides of the aisle, although it does seem to be Beat Up On New York Day. So I thought it would be very important to clear up some of the factual inaccuracies that I think were presented, not in bad faith, of course.

Now, Mr. Porter, would you agree that Federalism is an important part of the constitutional construct that we have in this great republic of ours?

Mr. PORTER. Certainly.

Mr. JEFFRIES. And is part of the premise of Federalism that each individual state has the capacity to determine for itself the best form of taxation for that particular jurisdiction? Correct?

Mr. PORTER. Certainly, within limits, yes.

Mr. JEFFRIES. So isn't it reasonable to conclude that the legislation that is before us is inconsistent with the notions of Federalism often put forth by people here in the country and certainly the Congress who talk a lot about individual states' rights?

Mr. PORTER. Well, I think in this particular case, as we talked about a little bit earlier, there have been movements to try to get the states as individual states to enact some type of legislation that would help in this particular issue, but that, I think as we said earlier, that hasn't happened. So the only way to get some type of uniformity would be for the Federal Government to provide that uniformity.

Mr. JEFFRIES. Now, do you think what New York City and New York State have done is fundamentally unfair in terms of the taxation system that they have put forth?

Mr. PORTER. I can't speak that much about the State of New York or the City of New York because I am not there. Sorry.

Mr. JEFFRIES. Okay. Well, I think it is clear, and I believe it was Mr. Carter who testified that New York State would lose about $100 million to $120 million. Is that correct?

Mr. CARTER. That is correct, with the legislation that is currently drafted.

Mr. JEFFRIES. Okay. Now let me go back to Mr. Porter. Picking up on a theme that was raised earlier, tax revenue pays in part for police protection; correct?

Mr. PORTER. Yes.

Mr. JEFFRIES. And when non-residents are temporarily in New York, they benefit from that police protection; true?

Mr. PORTER. Correct.

Mr. JEFFRIES. And isn't it the case that New York City as a center of commerce for the country, if not the world, is uniquely positioned in that it draws people from all over the country, from different regions—in fact, from different parts of the world—to work in New York City at a disproportionately higher rate than may exist in other parts of the country? Is that a fair characterization?

Mr. PORTER. Are you stating that wages in New York City are going to be higher than wages in other parts of the country?

Mr. JEFFRIES. People temporarily find themselves deployed for work reasons in New York City in numbers greater than in probably any other part of the country because New York City is a center of commerce. Is that a fair characterization?

Mr. PORTER. I would agree with that, yes.

Mr. JEFFRIES. So there is a higher burden that is placed on New York City in terms of police protection than in any other part of the country because of the high number of workers temporarily residing there. Is that fair to say?

Mr. PORTER. I think that is true and I would agree with that. But I think also, as was mentioned earlier, when I am in New York City I am paying taxes when I fly in, I am paying airport taxes, I am paying hotel taxes, I am paying food taxes that, as a guy from West Virginia would think, are higher than what I would be paying in West Virginia. So I understand that I am paying——

Mr. JEFFRIES. Let me reclaim my time. I do appreciate that, but my time is limited. And the same would apply for fire safety protection; correct? That it would benefit non-residents temporarily working there; true?

Mr. PORTER. True.

Mr. JEFFRIES. The same would apply to sanitation services; correct?

Mr. PORTER. Correct.

Mr. JEFFRIES. The same would apply to the extensive New York City mass transportation system; correct?

Mr. PORTER. Correct.

Mr. JEFFRIES. Now, in terms of this general, overall point, and this has really bothered me since my time here in Congress, and I only have a little bit of a moment to express it, you have states like New York, California, Illinois, Connecticut that regularly send, in some instances, tens of billions of dollars more to the Federal Government than we get back in return. And in the most recent study that I have seen, New York State sent $23 billion more to the Federal Government than we get back in return.

Is that fair, sir?

Mr. PORTER. I guess that would depend upon your characterization of—again, I think you are talking about Federal revenues as opposed to the state issues, which is——

Mr. JEFFRIES. And I am talking about Federal revenues that then get disbursed to other states. And let me just note for the record that two of those states that actually receive more money from the Federal Government than they get back in return are Georgia, which receives almost $4 billion more in revenue than they send to Washington, D.C., and Alabama, which is 47th on the list in terms of a negative disparity, positive for the great State of Alabama, which receives——

Mr. BACHUS. You are beginning to run over your time. [Laughter.]

Mr. JEFFRIES [continuing]. Which receives $17 billion more—and I appreciate the Chair's indulgence—$17 billion more than they get back in return. So all I am saying is that if we want to confront unfairness, let's deal with unfairness broadly defined.

We are happy in New York State to support states like Georgia and Alabama, and these are two very good men, two very good representatives. But to make the situation worse for a donor state like New York in my view is fundamentally unfair, and I yield back.

Mr. BACHUS. Thank you, Mr. Jeffries.

We are going to have a second round now, and we will alternate.

Let me ask the accountants on the panel. I also heard the same testimony that Mr. Jeffries did about the $100 million, and I was sitting there thinking about what Ms. Brown's company had to go through and all these extra income tax returns.

I am wondering what is the cost of filing all these additional income taxes. I mean, I would think that probably—and I would have thought it was a whole lot more than $100 million. But I would think that just the accountants, which the customers pay—the accountants may do the taxes, but the customers pay.

For instance, one thing they are doing that Ms. Brown said, they are paying taxes in two different places. But then they are having to file an income tax return—I wouldn't be surprised if it was $200 million worth for New York or any state. We talked about New York. Mr. Jeffries talked about people traveling to New York all the time. Believe you me, they travel to Dallas, they travel to Las Vegas, they travel to all these places that don't collect this income tax. So, I mean, they travel.

But I am wondering, Mr. Porter, any one of you, how much do you estimate just the cost of compliance is with, say, New York? I mean, that is where most of the resistance is coming from.

Mr. PORTER. I have no idea how much it would be on a state-by-state basis. I can just speak to what I see typically in my practice and when I am preparing tax returns. Again, the type of returns—I am from West Virginia, a predominantly rural community. The individuals that I am preparing taxes for are average Americans that are making $100,000, $50,000, whatever the number may be. And I can tell you that when I start doing multiple tax returns for multiple states, each additional state is probably going to increase their fees by 30, 40 percent per state from what they are going to pay.

So there is a fair amount of cost involved to the individuals. There is also a fair amount of cost involved to the employers that are having to keep up with all of the recordkeeping and keep up with all of the tax systems across the country that they have employees working in.

Ms. RIEHL. Mr. Chairman, one of the reasons this bill, the legislation first passed in the Congress, we have doubled the number of coalition supporters. We are now at 263 organizations, and that is because of the exorbitant cost to those companies, and those are fairly large. But we did hear testimony about how this disproportionately affects small businesses as well, who do this on their own or they have to pay for an expert outside. But the disproportionate cost, the exorbitant cost, and certainly the compliance burden.

So when you put those together, it depends on how sophisticated your systems are now and what you have to do to be in compliance later. We are really trying to avoid much of that.

I will say on the $100 million in New York, we have a difference of opinion. We have actually calculated that differently in the Ernest & Young study that is part of the record, and I would say this. If, in fact, New York claims that it is as high as $100 to $120 million, that doubles the impact to the states it is pulling it away from. So the biggest impact state right now is the State of New Jersey. We think it is about $26 million. If it is, in fact, as New York says, closer to double that number, it is more like $50 million.

So it is not money that is coming from New York from invisible places. It is actually coming from the coffers of other states.

Mr. BACHUS. Right. And, I mean, Mr. Jeffries mentioned Federalism, and that is our system in this country. But he was talking about the Constitution, and Section 8 of the Constitution specifically gives the Congress the power to regulate commerce among the several states, interstate commerce, and we are not supposed to burden or restrain it. And, boy, this comes pretty close to a burden on interstate commerce.

Let me close. I have 34 seconds.

I just found out that—and I am not picking on New York. You used that as an example, Mr. Carter. But they have been most resistant to this legislation. If I take my car in—I didn't realize this, but if I park in Manhattan, I pay 18.3 percent tax on parking my car. I will tell you, $30 or $40, and then I am paying $6.00 or $8.00 tax every day. That is a pretty good deal for New York, on top of everything else. I guess I will just pay that airport tax next time. But I can't get around the lodging tax.

Mr. Johnson?

Mr. JOHNSON. Thank you, Mr. Chairman.

Does anyone know how much money or how much revenue, let's say, New York—by the way, I am not beating up on New York. I love New York.

I love New York. That sounds so good.

Mr. BACHUS. You have to, because of all the taxes you pay when you go there.

Mr. JOHNSON. But does anyone know how much New York collects in non-resident income taxes per year?

Ms. RIEHL. If this law was to change from their 1-day rule for an employee and a 14-day rule for withholding for the employer, at this point if it changed to the 30-day standard found in 1129, we think it would impact the state to the tune of about $45 million. I don't know what they get in actual revenue under the current system.

Mr. JOHNSON. Do you have any idea, Mr. Carter?

Mr. CARTER. I do not, Ranking Member.

Mr. JOHNSON. I wonder if they have any idea.

Well, let's look at it from the other side. How many employees, non-resident employees, actually fill out a New York State income tax return? Do we know that?

Mr. CARTER. I do not. I do know in Delaware that we receive total tax returns that come in, approximately 20 percent of the returns are from non-residents and 80 percent are from residents. I would speculate that New York State, especially when you get down around the southern part of the state, has a very high percentage. But the state as a whole, I don't know if it is the same 80/20 percent or——

Mr. JOHNSON. So, in other words, you are saying Delaware, of the 100 percent of tax returns you receive, 20 percent of those are from——

Mr. CARTER. Non-residents.

Mr. JOHNSON [continuing]. Non-residents.

Mr. CARTER. Yes. We receive approximately half-a-million returns a year, of which 400,000 are resident returns and 100,000 non-resident returns.

Mr. JOHNSON. Now, all of those non-resident income tax returns were generated as a result of employers having to withhold. Is that correct?

Mr. CARTER. For the most part, yes.

Mr. JOHNSON. We do have employers who are charged with the duty of abiding by state law, each and every state law, 50, and so this is a cost that businesses bear who actually keep up with all of that.

Mr. CARTER. Correct.

Mr. JOHNSON. And if they fail to keep up with it, then they are liable under Federal law.

Mr. CARTER. Not Federal law. Well, they are liable for the state tax liability.

Mr. JOHNSON. Yes.

Mr. CARTER. Under state tax law.

Mr. JOHNSON. Under Federal law, Sarbanes-Oxley, the chief executive would have to sign documentation——

Mr. CARTER. Under Sarbanes-Oxley.

Mr. JOHNSON [continuing]. Swearing that they are in compliance with each and every state law within which they are operating.

Mr. CARTER. Correct from that aspect.

Mr. JOHNSON. Any idea how much that actually costs the businesses, both large and small? Anyone?

Ms. RIEHL. Mr. Johnson, again, I think that we have asked for that kind of data from our coalition members, and they don't know how to assess it themselves. But you are correct in that Sarbanes-Oxley and some of the other changes that have happened recently at the Federal level to financial reporting documents put personal liability on corporate officers and their tax preparers; that they, in fact, are attesting legally to be in compliance with all Federal, state, and local laws. And that is precisely why there is a growing number of supporters of this legislation, because they are at risk of being out of compliance. They sign these forms—they have to—and there is not necessarily knowledge that they are in full compliance, and that is what we are trying to rectify.

Mr. JOHNSON. In each of these states, the legislators meet maybe once a year or one session per year. These sessions take place at different times during the year, and sometimes there can even be special sessions. And in any particular session in any particular state, there could be a change in the income tax laws. So these businesses, both large and small, are charged with the responsibility of keeping up, monitoring these 50 state legislatures. Is that correct?

Ms. RIEHL. Yes.

Ms. BROWN. Absolutely, and sometimes some of those laws are retroactive. So not only does the employer have to know about it and comply with it, but sometimes it is even retroactive.

Mr. JOHNSON. I really hate that one or two states may suffer a decline in income tax revenue because of this legislation, should it pass. However, looking at the greater good, I think that is something that we have to consider. It is really not meant to hurt any particular state.

But I am comforted in knowing that New York does have quite vigorous taxing rates for various activities, so I don't believe they are going to go broke. Plus, they just did some tax—I think, watching TV, I see where if you locate your business in New York in a certain location, certain locations throughout the State of New York, you may not have to pay any taxes as a corporation.

Ms. RIEHL. That is for new businesses and definitely part of a very comprehensive tax reform effort that the state just finished within the last 30 days. One of the items that was suggested that they look at in their budget reform was actually changing these rules, but they neglected to do so.

Mr. JOHNSON. Changing the income tax rules.

Ms. RIEHL. The non-resident withholding rules, yes.

Mr. JOHNSON. Yes, because one day——

Ms. RIEHL. Is too lucrative.

Mr. JOHNSON. Yes. And so companies don't want to locate there because of that factor.

Ms. RIEHL. And that is why the change was made to invite new businesses in. I should say that we have had ongoing, good dialogues with representatives of the Governor's Office and others in Albany over the last several years on this, and it is a sensitive issue for them in that they have just done a very good job when it comes to enforcing the law as it is on the books.

However, after a transition period, after H.R. 1129 is actually passed and there is a new starting date of 30 days, New York can certainly start at Day 31 doing exactly what it does right now. The only advantage that really a state like New York with aggressive auditing has is that other states aren't being just as aggressive against them, plus the fact that there are disparate rates. So when you visit New York, the best you can hope for when you are credited against your Georgia resident income tax obligation is the Georgia rate. New York's rate is mostly high compared to other states, and so there is still going to be a fraction that will never be recouped even under a credit system.

So I think in measuring, New York still can be a little bit ahead of the curve just simply because their rates are higher and they have been more productive with that. We just want a new starting date.

Mr. JOHNSON. Thank you. And, with that, I would yield back.

But I would confess my embarrassment at my own great State of Georgia, being the Republican citadel that it is, is actually mooching on the Federal Government. I just never knew that, and I am horrified. I am horrified. I am embarrassed.

Thank you.

Mr. BACHUS. Obviously, the Alabama and Georgia delegations have been doing a fine job for their citizens. [Laughter.]

I do want to correct the record. I said in Manhattan you pay—the city charges 10.3 percent, and then there is a Manhattan tax of 8-something. But that only applies—I mean does not apply to Manhattan residents. They are exempted from that 8.3 percent tax. So only if you are visiting do you get hit by that. But I bet even if you are not visiting, you get the same protection. They exempt their own residents from that tax.

This concludes today's hearing. Our thanks to all of our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

I really appreciate your all's testimony, all four of you. I think you were ecellent witnesses.

This hearing is adjourned.

Mr. CARTER. Thank you, Mr. Chairman, Ranking Member.

[Whereupon, at 3:12 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Material Submitted for the Hearing Record

Statement of the Honorable John Conyers, Jr. for the Hearing on H.R. 1129, the "Mobile Workforce State Income Tax Simplification Act of 2013"

Thursday, April 29, 2014, at 1:00 p.m.
2141 Rayburn House Office Building

H.R. 1129, the "Mobile Workforce State Income Tax Simplification Act," addresses important record-keeping and income tax liability issues in a work environment where employees are increasingly traveling to states where they are not residents.

As we consider this legislation, however, there are several factors that should be kept in mind.

To begin with, the problems presented by employee tax liability and employer withholding are multifaceted.

Employers must meet oftentimes burdensome tax compliance record-keeping requirements for their mobile workers.

These workers, in turn, are often subject to potentially conflicting multiple state income tax requirements.

The paperwork both must file can be complicated and time-consuming.

And the filings, especially for sometimes miniscule amounts of income, can even be burdensome to state revenue departments.

But any legislative response must be carefully balanced so that it addresses the needs of *all* affected stakeholders.

Several years ago, our Committee facilitated collaborative meetings between the business community and the states to address concerns the states shared about previous legislation intended to address these problems.

As a result of these efforts, various recommendations were made, some of which are reflected in H.R. 1129.

These changes include clarifying the definitions of certain terms and lowering the threshold for when an employer must withhold income taxes from employees' paychecks.

I applaud my colleagues, Representatives Coble and Johnson, for including these changes in the latest version of this legislation.

And it is encouraging to know that the business community continues to collaborate with the states, particularly New York, which is the state any legislative proposal on this issue would most impact.

Finally, Congress must be mindful of any legislation that may adversely impact state revenues and thereby impede the ability of these states to provide needed services to their residents.

Unfortunately, the current iteration of H.R. 1129, if enacted, could result in some states, including my own state of Michigan, losing millions of dollars in revenue.

In fact, New York could lose upwards of $100 million in revenue.

Fortunately, this legislation only needs some simple changes to eliminate these negative impacts.

For example, the bill currently would establish a 30-day threshold before an employee would be required to pay income taxes in a state. A much lower threshold - such as 20 days, which the Multistate Tax Commission has suggested - would be fairer to the states and still provide certainty to employers and employees.

In addition, the bill's timekeeping requirements could be tightened to help prevent tax avoidance.

I appreciate the progress H.R. 1129 represents toward addressing the problem of a mobile workforce.

A solution is close and I look forward to working with my colleagues and the various stakeholders to finally achieve this goal.

Statement for the Record submitted by Congressman Jim Himes (CT-4)

In Support of the Multi-State Worker Tax Fairness Act of 2014
Tuesday, April 29, 2014

Today, the Judiciary Committee will consider Mobile the Workforce State Income Tax Simplification Act. This legislation would establish a uniform standard to determine whether an employee who works in multiple states is subject to personal income tax in a given state. Specifically, the bill would require that a nonresident employee be present and working in a state for more than 30 days during the year before the state could tax his wages.

Simplifying tax compliance for multistate workers and their employers is worthwhile goal. However, to be even more effective, I would recommend that the Mobile Workforce bill be amended to abolish a state tax rule known as the "convenience of the employer" rule, as addressed by the Multi-State Worker Tax Fairness Act of 2014 (H.R. 4085), a bill that I have introduced.

The convenience of the employer rule is used in New York, Pennsylvania, Delaware, New Jersey and Nebraska. All wages earned from an employer located in these states are allocated to that state unless the nonresident employee's work *must* be performed from his or her out-of-state location.

This rule has been most aggressively enforced by the taxing authority in New York, legally challenged, and upheld. There, for example, if a nonresident works for a New York employer and chooses to split his work time between the New York office and his home office, the nonresident must pretend that the days he spent in his home state were days he spent in New York *unless* he is able to prove that his telework arrangement was an employer necessity, rather than merely a convenience for him or his employer. If he fails to make that case, he must then treat all of his salary - including the part he earned in his home state - as New York income and pay taxes to New York on it.

More broadly, the convenience rule allows states to subvert Mr. Coble's bill's simplification goal because states can use it to dodge the 31-day requirement. They can then use this rule to force nonresidents who spend fewer than 31 days in the state where their employer is based to pretend that days they worked in their home state were days they worked in the state of their employer, thereby subjecting the employee to state income taxes.

Furthermore, the convenience rule adds to the confusion by requiring mobile workers who are physically present in their employer's state for 31 or more days per year to follow different rules for nexus and apportionment purposes. While a worker who maintains residence in one state and works in another must use the 31-day rule to determine whether *any* of his income is subject to his employer's state's income tax, he then must then count days he spent in his home state as work days in his employer's state for tax purposes. Requiring a worker to apply different definitions of "presence" depending on which part of this question he is answering adds senseless complexity to tax compliance.

The Multi-State Worker Tax Fairness Act of 2014 tackles the convenience rule issue and the question of how to simplify apportionment for mobile workers whose income is deemed taxable by their employer's state. Specifically, it explicitly prohibits states from employing a convenience rule to determine presence, thereby only subjecting mobile workers who maintain a sufficient *physical* presence in their employer's state to be subject to that state's income tax. Secondly, this bill prevents states from taxing income nonresidents earn when they are physically present in another state, allowing workers to more justly apportion their tax duty based on where they have actually done their work.

Mr. Coble's bill serves a very important function for the millions of Americans who travel frequently for business purposes. I agree with Mr. Coble and those who support his bill that we need to establish a federal standard for the application of state income taxes on work performed by the growing number of employees who work in multiple different states.

I believe, however, that we owe our telecommuting constituents the same tax fairness, certainty, and simplicity. It is critical, then, that we eliminate the convenience of the employer rule and create a clear physical presence standard for both nexus and apportionment purposes. My bill accomplishes both of these goals, and I strongly support its consideration and passage.

Statement of
Federation of Tax Administrators

Before the
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Of the
House Committee on the Judiciary
In the
U.S. House of Representatives

H.R. 1129
Mobile Workforce State Income Tax Fairness and Simplification Act of 2013

April 29, 2014

Patrick Carter
Director, Division of Revenue for the State of Delaware
Past President, Federation of Tax Administrators

Mr. Chairman and Members of the Subcommittee:

The Federation of Tax Administrators appreciates this opportunity to appear before you on H.R. 1129, the Mobile Workforce State Income Tax Simplification Act of 2013, a bill that would limit the ability of state and local governments to impose and enforce existing income taxes on individuals working in multiple states. I am Patrick Carter, the Director of the Division of Revenue for the State of Delaware and also a past president of the Board of Trustees of the Federation of Tax Administrators.

Introduction

The Federation of Tax Administrators (FTA) is an association of the principal tax and revenue agencies in each of the fifty states, the District of Columbia, New York City and the City of Philadelphia. Our purpose is to improve the practices and standards for tax administration through research, information exchange, training programs and by representing the interests of state tax administrators before Congress and the federal executive branch.

The general position of the Federation with respect to this legislation is embodied in Resolution 2012-2, adopted by the membership at its 2012 Annual Meeting in Washington, D.C. A copy of the resolution is attached as an addendum to this testimony.

Primary Basis for the FTA's Opposition to H.R. 1129

FTA opposes enactment of H.R. 1129 as introduced for a number of reasons, the most critical of which are:

1. H.R. 1129 runs directly counter to a fundamental, underlying principle of income taxation – namely that income should be taxed where it is earned or where the services giving rise to the income are performed. This is the principle on which the federal government's own individual income tax is based, as well as the income taxes imposed by states. Abrogation or abandonment of this "source" principle will allow individuals to avail themselves of a state's economic marketplace without paying for that benefit (in competition with that state's residents and instate businesses).

2. The 30-day threshold, while less than proposed in earlier versions of the legislation, still amounts to a full six work-weeks, which is greater than what is currently allowed by most states with statutory thresholds. Quoting from the dissenting views in the report of the Judiciary Committee on the 2011 version of the legislation, the 30-day threshold is "excessive," "goes too far," and will lead to "severe state revenue losses."

3. The State of New York alone estimates that it would experience a revenue loss of $106 million annually as a result of H.R. 1129.

4. Supporters claim that for states other than New York, H.R. 1129 is "neutral," arguing that tax not withheld or paid in one state will be withheld and paid in another. However, states with income taxes already experience enforcement difficulties when taxpayers claim to have changed domiciles (when in fact they have not), attempting to shift income to one of the nine states that have no broad-based individual income tax. H.R. 1129 will provide similar opportunities for workers who reside or work in non-tax jurisdictions to improperly shift income into those jurisdictions from other taxing jurisdictions where the income is actually earned.

5. Most states, like the federal government, rely on income taxes to fund important governmental functions. And just as the federal government does, states require employer recordkeeping, reporting and withholding of tax from employee wages as the primary mechanisms to ensure tax compliance. H.R. 1129 limits states' ability to require employer recordkeeping, reporting and withholding. Studies done over the years by the IRS and reported to Congress, as well as studies by the states, show that employer withholding and information reporting is essential to minimizing the "tax gap" (the amount of underreported taxes that would otherwise result). Most recently, the IRS reported that income subject to withholding and information reporting, combined, is on average underreported by only 1 percent. Income subject to neither withholding nor information reporting is on average underreported by 56 percent.

6. H.R. 1129 undercuts the important recordkeeping, reporting and withholding mechanisms that the states need to enforce their income tax statutes by allowing employers to rely, not on their own records, but on a one-time estimate made by the employee, a year in advance, as to where the employee expects to be working for the coming year. At best, such employee estimates are unlikely to be reliable. At worst, employees are offered an incentive to make inaccurate estimates — for example, when an employee who resides in a non-tax state travels to states that impose income taxes. Under H.R. 1129, states could not require an employer to keep records to show where its employees actually worked, leaving state tax administrators with little means to verify whether employee estimates are accurate.

7. While H.R. 1129 does not apply to certain individuals (professional athletes, professional entertainers and public figures), it does not exclude highly compensated individuals. The bill ignores how much an individual is compensated for services performed in a state.

8. H.R. 1129 will also create situations in which individuals in relatively similar situations are treated substantially differently for state income tax purposes. For example, employees and independent contractors will be subject to different rules (federal versus state-level thresholds). Employees from states without an income tax who work in another state but do not exceed the proposed 30-day threshold will pay no tax to any state, while employees from states with an income tax who do likewise will presumably pay tax to their home state on the income earned in the other state.

9. H.R. 1129 contains provisions and terms that are ambiguous, which may lead to litigation and ultimately lead to differences in the ways that states interpret and apply the rules. For example, the bill uses the term "employment duties" but does not define that term. This term is critical to counting days toward the 30-day threshold and is likely to be subject to dispute in cases where an employee may stay in the state for some period, but may claim not to be performing "employment duties" during the entire stay.

10. If, as the states fear, H.R. 1129 results in manipulation or abuse by some individuals, states will have to increase enforcement efforts in this area. This may lead to additional time and resources spent on audits or investigations, perhaps directly focused on individual employees, or on other administrative alternatives necessary to supplement the lack of employer recordkeeping, reporting and withholding.

11. Finally, H.R. 1129 represents a substantial intrusion by the federal government into state sovereignty.

FTA's Involvement with the Issues Addressed in H.R. 1129

Employees and employers have always been required to keep records to comply with state and local income tax reporting and collection regimes. (Similar requirements are imposed under the federal income tax system for employees who claim non-taxable travel reimbursements or who spend periods of time working overseas.) As workers travel more, states understand that these requirements will affect more businesses, and may pose a relatively higher burden on small businesses.

But as with all types of enforcement, states are not generally concerned with de minimis activities. Most have explicit or implicit thresholds that they have adopted by law or regulatory policy. Nor is H.R. 1129 limited to smaller employers and businesses, but would apply to any employer regardless of the size or the sophistication of its recordkeeping systems. In addition, records may still be required for other accounting, federal tax, travel reimbursement or employee benefit purposes. (Note that, while these exist, employers will not have to use those records for state withholding under the bill). Moreover, improvements in information technology have greatly lessened the burden of recordkeeping for tax reporting purposes and such improvements are likely to continue.

Nevertheless, the states and the FTA have worked with the Committee's staff and industry representatives for almost a decade on this legislation, seeking a balanced solution to tax enforcement concerns and business compliance requirements. The states have proposed a solution to be enacted by state lawmakers which we believe would be preferable, but this solution may not have had the support needed to make it a reality because, in part, industry groups have focused their efforts instead on this federal legislation.

Conclusion

We ask that Congress continue to balance the interests of the states to make sure that the states can maintain a functioning individual income tax system and that tax liabilities can be properly enforced. It makes sense for Congress to minimize the intrusion into state authority and avoid disruption of state revenue systems. Any solution must be directed squarely at the problem and not create other unintended consequences.

Thank you, Mr. Chairman.

Addendum

Federation of Tax Administrators Resolution 2012-2

(Note that references in this resolution are to a prior version of this legislation.)

Background

The fundamental principle of individual income taxation is that income is taxable where it is earned or where the services giving rise to the income are performed. In addition, the state of a taxpayer's residence may tax all income regardless of where earned, but is generally required to offer a credit for taxes paid to other states to assure that income is not subject to multiple taxation. This is the same tax policy embraced by the U.S. government and by all other income-taxing governments.

As United States work patterns shift to increasingly include interstate commuting, telecommuting and multistate travel, more workers find themselves with tax obligations to more than one jurisdiction. Likewise, employers are faced with an increased responsibility for withholding income taxes for multiple jurisdictions. State and local laws and practices vary with respect to de minimis thresholds for withholding. There also is variance in enforcement programs aimed at compliance among persons (and their employers) that are temporarily in the jurisdiction.

H.R. 1864, the Mobile Workforce State Income Tax Fairness and Simplification Act, passed in May 2012 by the House of Representatives, would authorize a state or locality to impose an income tax liability and a withholding requirement only when a nonresident has performed services in the jurisdiction for at least 30 days in a calendar year. The bill contains an exception for professional athletes and entertainers.

In response to bills introduced in previous Congresses, the Multistate Tax Commission developed a state model mobile workforce statute. The work product reflects input from industry and employer representatives.

In its review of H.R. 1864 and in various discussions with proponents of the bill, FTA made several points:

- H.R. 1864 represents a substantial preemption and intrusion into state tax authority;
- While FTA recognizes concerns regarding the administrative burdens imposed by current practices, the 30-day threshold remains beyond a level necessary to deal with the vast majority of individuals who would be temporarily in a jurisdiction;
- H.R. 1864 would substantially disrupt the current tax system in favor of a system based on taxation by the resident jurisdiction;
- H.R. 1864 would substantially disrupt the revenue flows in certain states, particularly New York State;

- A simple "days threshold" will expose some jurisdictions to substantial revenue disruptions, so a "dollar threshold" that would limit the exposure of the states should also be applied.
- Independent state action is a viable and preferred substitute for federal legislation.

Policy

The ability to tax income where it is earned is fundamental to state tax sovereignty and state and local income tax systems. Moreover, this ability is absolutely necessary in under our constitutional framework, where a state may choose to not employ an income tax. FTA finds the Act is not an appropriate balance between administrative simplification and adherence to standard tax policies and it inappropriately disrupts state and local revenue flows. FTA does not support the Act as passed by the House.

Congress and the U.S. federal agencies should refrain from enacting measures, taking actions or making decisions that would abrogate, disrupt or otherwise restrict states from imposing taxes that are otherwise lawful under the U.S. Constitution or from effectively administering those taxes. Congress should undertake an active program of consultation with states as it considers measures that would preempt state tax authority. Finally, states should actively pursue such uniformity and simplification measures as are necessary and effective to address concerns of administrative burden in complying with the tax laws of multiple states. FTA will encourage and support uniform actions by states as the preferred solution to issues that prompt federal preemption.

While federal preemption is generally to be resisted, preemptive legislation can, at times, promote administrative issues such as simplification, uniformity, and taxpayer compliance, albeit at some cost to state sovereignty. FTA will evaluate proposed federal legislation that preempts state taxing authority against several criteria. (1) Has the preferred solution of uniform state action been pursued and exhausted? (2) Recognizing that the benefits of federalism will impose administrative burdens on commerce, is there disinterested evidence that the administrative burden and complexity posed by current state and local practices is impeding the growth of commerce? (3) Does the proposed preemption address administrative issues such as simplification, uniformity, and taxpayer compliance? (4) Can meaningful simplifications and uniformity be achieved through state action? (5) Would preemption disrupt state and local revenue flows and tax systems? (6) Would preemption cause similarly situated taxpayers to be taxed differently -- specifically, does the proposal create advantages for multistate and multinational businesses over local business? (7) Does the preemption support sound tax policy? (8) Does the preemption create unknown or potential unintended consequences? (9) Have state tax authorities and taxpayer representatives together agreed to a beneficial change in federal law? (10) Does the proposed preemption materially narrow the scope of state laws?

In addition, FTA makes the following specific comments on the Act and similar legislation:

Coordinated state action should be pursued and exhausted.

Federal legislation should not proceed until proponents of the Act have worked with New York State officials to resolve the fiscal impact on that state.

If Congress elects to take action in this area, any resolution of the issue should, at a minimum, meet the following criteria:

- The action should be clearly limited to wages and related remuneration earned by nonresident employees. The legislation must also be clear that it is not intended to impair the ability of states and localities to tax non-wage income earned from the conduct of other economic activities in the taxing jurisdiction.
- The action should provide that a state or locality may impose income tax liability on and a withholding obligation with respect to the wage and related remuneration of a nonresident if the nonresident is present and performing services exceeding a de minimis threshold in a calendar year.
- Alternatively, the threshold could be formulated as limiting state and local income taxation (and withholding) to those nonresidents present and performing services in the jurisdiction whose earnings exceed a de minimis threshold in wages and related remuneration in the prior year.
- The action should provide that all persons paid on a "per event basis" are excluded from the coverage of the bill.
- The action should provide for the allocation of a day to a nonresident jurisdiction when services are performed in the resident jurisdiction and another jurisdiction in a single day.
- The action should cover wages and remuneration earned within a jurisdiction in a calendar year so as to not disrupt taxation of any deferred amounts. It should not, however, impair the ability of states and localities to tax income arising from the conduct of other economic activities in the taxing jurisdiction.
- The effective date of any action should be delayed until the beginning of the second calendar year following enactment to allow sufficient time for implementation by state and local governments and affected employers.

This discussion should not be interpreted to imply that FTA considers that a physical presence standard is in any way an appropriate standard for establishing jurisdiction to tax in other contexts, particularly for the imposition of business activity taxes on entities doing business in a state. FTA is firmly opposed to federal legislation that would establish a physical presence nexus standard for the imposition of business activity taxes.

This resolution shall be in effect for three years from the date of enactment unless replaced by a subsequent resolution.