

**Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011**

SENATE BILL NO. 2170
(Senator Cook)
(Representative Belter)

AN ACT to create and enact a new section to chapter 57-38 of the North Dakota Century Code, relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees; to amend and reenact subsection 1 of section 57-38-59 of the North Dakota Century Code, relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 1 of section 57-38-59 of the North Dakota Century Code is amended and reenacted as follows:

1. ~~Every~~Except as provided in section 2 of this Act, every employer making payment of wages to employees shall deduct and withhold from their wages such percentage or percentages, as determined by the tax commissioner, multiplied times the total amount required to be deducted by an employer from wages of an employee under the provisions of the Internal Revenue Code of 1986, and as hereafter amended, as will approximate the income taxes due the state. The amount of tax withheld must be computed without regard to any other amount required to be withheld thereunder, but the tax withheld must as closely as possible pay any tax liability imposed by this chapter.

SECTION 2. A new section to chapter 57-38 of the North Dakota Century Code is created and enacted as follows:

Nonresident mobile workforce - Computation of taxable income - Exclusion - Exception for employer withholding - Returns required.

1. a. Compensation subject to withholding under section 57-38-59, without regard to subsection 3, that is received by a nonresident for employment duties performed in this state, shall be excluded from state source income if:
 - (1) The nonresident has no other income from sources in this state for the tax year in which the compensation was received;
 - (2) The nonresident is present in this state to perform employment duties for not more than twenty days during the tax year in which the compensation is received. Presence in this state by the nonresident for any part of a day constitutes presence for that day unless the presence is purely for purposes of transit through the state; and
 - (3) The nonresident's state of residence provides a substantially similar exclusion or does not impose an individual income tax or the nonresident's income is exempt from taxation by this state under the United States Constitution or federal statute.
- b. This subsection does not apply to compensation received in this state by:
 - (1) A professional athlete or member of a professional athletic team;
 - (2) A professional entertainer performing services in the professional performing arts;
 - (3) A person of prominence performing services for compensation on a per event basis;

- (4) A person performing construction services to improve real property;
 - (5) A key employee under section 416(i) of the Internal Revenue Code, as amended [26 U.S.C. 416(i)], for the year immediately preceding the current tax year. A determination under this paragraph must be made without regard to ownership or the existence of a benefit plan;
 - (6) An employee of a noncorporate employer, who would be a key employee without regard to ownership or the existence of a benefit plan, for the year immediately preceding the current tax year under section 416(i) of the Internal Revenue Code [26 U.S.C. 416(i)], if the term "employee" were substituted for the term "officer" in section 416(i)(1)(A)(i) of the Internal Revenue Code and if such person is one of the noncorporate employer's fifty highest paid employees without regard to whether such person is an officer.
- c. This subsection shall not prevent the operation, renewal, or initiation of any agreement with another state authorized under section 57-38-59.1.
 - d. This subsection creates an exclusion from nonresident compensation under certain de minimus circumstances and has no application to this state's jurisdiction to impose this or any other tax on any taxpayer.
- 2. a. A nonresident whose only state source income is compensation excluded under subsection 1 does not have an income tax liability and is not required to file a return as prescribed in section 57-38-31, except nothing in this subsection prohibits the tax commissioner from exercising the commissioner's discretion to require the filing of an informational return by a nonresident employee described in subdivision a of subsection 1.
 - b. This subsection is applicable to the determination of an individual income taxpayer's filing requirement and has no application to the imposition of, or this state's jurisdiction to impose, this or any other tax on any taxpayer.
- 3. a. No amount is required to be deducted or retained from compensation paid to a nonresident for employment duties performed in this state if the compensation is excluded from state source income under subsection 1, without regard to paragraph 1 of subdivision a of subsection 1. The number of days a nonresident employee is present in this state for purposes of paragraph 2 of subdivision a of subsection 1 must include all days the nonresident employee is present and performing employment duties on behalf of the employer and any other related person.
- (1) For purposes of this subsection, "related person" means a person that, with respect to the employer during all or any portion of the taxable year, is:
 - (a) A related entity;
 - (b) A component member as defined in section 1563(b) of the Internal Revenue Code [26 U.S.C. 1563(b)];
 - (c) A person to or from whom there is attribution to stock ownership as provided in section 1563(e) of the Internal Revenue Code; or
 - (d) A person that, notwithstanding its form of organization, bears the same relationship to the employer as a person described in subparagraphs a through c.
 - (2) For purposes of this subsection, "related entity" means:

- (a) A stockholder who is an individual, or a member of the stockholder's family as provided in section 318 of the Internal Revenue Code [26 U.S.C. 318] if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially, or constructively, in the aggregate, at least fifty percent of the value of the employer's outstanding stock;
 - (b) A stockholder, or a stockholder's partnership, limited liability company, estate, trust, or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts, and corporations own, directly, indirectly, beneficially, or constructively, in the aggregate, at least fifty percent of the value of the employer's outstanding stock; or
 - (c) A corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the federal Internal Revenue Code if the employer owns, directly, indirectly, beneficially, or constructively, at least fifty percent of the value of the corporation's outstanding stock. The attribution rules of the federal Internal Revenue Code shall apply for purposes of determining whether the ownership requirements of this definition have been met.
- b. An employer that erroneously applies the income tax withholding exception solely as a result of miscalculating the number of days a nonresident employee is present in this state to perform employment duties shall not be subject to the penalty imposed in section 57-38-45 if:
- (1) The employer relied on the employer's regularly maintained time and attendance system that:
 - (a) Requires the employee to contemporaneously record the employee's daily work location each day the employee is present in a state other than the employee's state of residence; and
 - (b) Is used by the employer to allocate the employee's wages between all taxing jurisdictions in which the employee performs duties;
 - (2) The employer relied on the employee's travel records that the employer requires the employee to regularly maintain and contemporaneously record the employee's travel and daily work location; or
 - (3) The employer does not require the records described in paragraph 1 or 2, and relied on travel expense reimbursement records that the employer requires the employee to submit on a regular and contemporaneous basis.
- c. This subsection establishes an exception to income tax withholding and deduction requirements and does not apply to the imposition of, or the state's jurisdiction to impose this, or any other tax on the employer.

SECTION 3. EFFECTIVE DATE. This Act is effective for taxable years beginning after December 31, 2012.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-second Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2170.

Senate Vote: Yeas 44 Nays 1 Absent 2

House Vote: Yeas 78 Nays 9 Absent 7

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2011.

Approved at _____ M. on _____, 2011.

Governor

Filed in this office this _____ day of _____, 2011,

at _____ o'clock _____ M.

Secretary of State