

**SENATE BILL NO. 2170**

Introduced by

Senator Cook

Representative Belter

1 A BILL for an Act to create and enact a new section to chapter 57-38 of the North Dakota  
2 Century Code, relating to the imposition of individual income taxes and employer income tax  
3 withholding for mobile workforce employees; to amend and reenact subsection 1 of section  
4 57-38-59 of the North Dakota Century Code, relating to the imposition of individual income  
5 taxes and employer income tax withholding for mobile workforce employees; and to provide an  
6 effective date.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

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

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

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

1 **Nonresident mobile workforce - Computation of taxable income - Exclusion -**

2 **Exception for employer withholding - Returns required.**

3 1. a. Compensation subject to withholding under section 57-38-59, without regard to  
4 subsection 3, that is received by a nonresident for employment duties performed  
5 in this state, shall be excluded from state source income if:

6 (1) The nonresident has no other income from sources in this state for the tax  
7 year in which the compensation was received;

8 (2) The nonresident is present in this state to perform employment duties for  
9 not more than twenty days during the tax year in which the compensation is  
10 received. Presence in this state by the nonresident for any part of a day  
11 constitutes presence for that day unless the presence is purely for purposes  
12 of transit through the state; and

13 (3) The nonresident's state of residence provides a substantially similar  
14 exclusion or does not impose an individual income tax or the nonresident's  
15 income is exempt from taxation by this state under the United States  
16 Constitution or federal statute.

17 b. This subsection does not apply to compensation received in this state by:

18 (1) A professional athlete or member of a professional athletic team;

19 (2) A professional entertainer performing services in the professional  
20 performing arts;

21 (3) A person of prominence performing services for compensation on a per  
22 event basis;

23 (4) A person performing construction services to improve real property;

24 (5) A key employee under section 416(i) of the Internal Revenue Code, as  
25 amended [26 U.S.C. 416(i)], for the year immediately preceding the current  
26 tax year. A determination under this paragraph must be made without regard  
27 to ownership or the existence of a benefit plan;

28 (6) An employee of a noncorporate employer, who would be a key employee  
29 without regard to ownership or the existence of a benefit plan, for the year  
30 immediately preceding the current tax year under section 416(i) of the  
31 Internal Revenue Code [26 U.S.C. 416(i)], if the term "employee" were

- 1                    substituted for the term "officer" in section 416(i)(1)(A)(i) of the Internal  
2                    Revenue Code and if such person is one of the noncorporate employer's  
3                    fifty highest paid employees without regard to whether such person is an  
4                    officer.
- 5            c.   This subsection shall not prevent the operation, renewal, or initiation of any  
6                    agreement with another state authorized under section 57-38-59.1.
- 7            d.   This subsection creates an exclusion from nonresident compensation under  
8                    certain de minimus circumstances and has no application to this state's  
9                    jurisdiction to impose this or any other tax on any taxpayer.
- 10        2.   a.   A nonresident whose only state source income is compensation excluded under  
11                    subsection 1 does not have an income tax liability and is not required to file a  
12                    return as prescribed in section 57-38-31, except nothing in this subsection  
13                    prohibits the tax commissioner from exercising the commissioner's discretion to  
14                    require the filing of an informational return by a nonresident employee described  
15                    in subdivision a of subsection 1.
- 16            b.   This subsection is applicable to the determination of an individual income  
17                    taxpayer's filing requirement and has no application to the imposition of, or this  
18                    state's jurisdiction to impose, this or any other tax on any taxpayer.
- 19        3.   a.   No amount is required to be deducted or retained from compensation paid to a  
20                    nonresident for employment duties performed in this state if the compensation is  
21                    excluded from state source income under subsection 1, without regard to  
22                    paragraph 1 of subdivision a of subsection 1. The number of days a nonresident  
23                    employee is present in this state for purposes of paragraph 2 of subdivision a of  
24                    subsection 1 must include all days the nonresident employee is present and  
25                    performing employment duties on behalf of the employer and any other related  
26                    person.
- 27            (1)   For purposes of this subsection, "related person" means a person that, with  
28                    respect to the employer during all or any portion of the taxable year, is:
- 29                    (a)   A related entity;
- 30                    (b)   A component member as defined in section 1563(b) of the Internal  
31                    Revenue Code [26 U.S.C. 1563(b)];

- 1                   (c) A person to or from whom there is attribution to stock ownership as  
2                   provided in section 1563(e) of the Internal Revenue Code; or  
3                   (d) A person that, notwithstanding its form of organization, bears the  
4                   same relationship to the employer as a person described in  
5                   subparagraphs a through c.  
6                   (2) For purposes of this subsection, "related entity" means:  
7                   (a) A stockholder who is an individual, or a member of the stockholder's  
8                   family as provided in section 318 of the Internal Revenue Code  
9                   [26 U.S.C. 318] if the stockholder and the members of the  
10                   stockholder's family own, directly, indirectly, beneficially, or  
11                   constructively, in the aggregate, at least fifty percent of the value of  
12                   the employer's outstanding stock;  
13                   (b) A stockholder, or a stockholder's partnership, limited liability company,  
14                   estate, trust, or corporation, if the stockholder and the stockholder's  
15                   partnerships, limited liability companies, estates, trusts, and  
16                   corporations own, directly, indirectly, beneficially, or constructively, in  
17                   the aggregate, at least fifty percent of the value of the employer's  
18                   outstanding stock; or  
19                   (c) A corporation, or a party related to the corporation in a manner that  
20                   would require an attribution of stock from the corporation to the party  
21                   or from the party to the corporation under the attribution rules of the  
22                   federal Internal Revenue Code if the employer owns, directly,  
23                   indirectly, beneficially, or constructively, at least fifty percent of the  
24                   value of the corporation's outstanding stock. The attribution rules of  
25                   the federal Internal Revenue Code shall apply for purposes of  
26                   determining whether the ownership requirements of this definition  
27                   have been met.  
28                   b. An employer that erroneously applies the income tax withholding exception solely  
29                   as a result of miscalculating the number of days a nonresident employee is  
30                   present in this state to perform employment duties shall not be subject to the  
31                   penalty imposed in section 57-38-45 if:

- 1           (1) The employer relied on the employer's regularly maintained time and  
2           attendance system that:  
3           (a) Requires the employee to contemporaneously record the employee's  
4           daily work location each day the employee is present in a state other  
5           than the employee's state of residence; and  
6           (b) Is used by the employer to allocate the employee's wages between all  
7           taxing jurisdictions in which the employee performs duties;  
8           (2) The employer relied on the employee's travel records that the employer  
9           requires the employee to regularly maintain and contemporaneously record  
10          the employee's travel and daily work location; or  
11          (3) The employer does not require the records described in paragraph 1 or 2,  
12          and relied on travel expense reimbursement records that the employer  
13          requires the employee to submit on a regular and contemporaneous basis.  
14          c. This subsection establishes an exception to income tax withholding and  
15          deduction requirements and does not apply to the imposition of, or the state's  
16          jurisdiction to impose this, or any other tax on the employer.

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