

Sixty-second
Legislative Assembly
of North Dakota

ENGROSSED 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

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)];

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) 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.