

2011 SENATE FINANCE AND TAXATION

SB 2170

# 2011 SENATE STANDING COMMITTEE MINUTES

Senate Finance and Taxation Committee  
Lewis and Clark Room, State Capitol

SB 2170  
1/19/2011  
Job Number 13247

Conference Committee

A. Rittmiller

## Explanation or reason for introduction of bill/resolution:

Relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees

## Minutes:

**Vice Chairman Miller** opened the hearing on SB 2170.

**Chairman Cook** – Earlier this session I made a comment about a need for us to address some tax policy that will bring us in to the twenty-first century. This is one of the bills that I was talking about. This bill will not affect anybody in the state of North Dakota who is a citizen of North Dakota. It will only directly affect out-of-state citizens who travel and work in our state. However, indirectly it could affect each and every one of us as we travel to other states and get paid while we are there if other states follow suit. This is a piece of model legislation that was developed by the Multi-State Tax Commission that sets a threshold at which time somebody would have to start having an income tax obligation in a state in which they did not reside but was working. That threshold is set at 20 days.

**Senator Triplett** – Do you know how many other states have enacted this so far?

**Chairman Cook** – You will get that exact information from Donnita. I don't think anybody has enacted it so far. It just came off of model legislation. There may be a state or two out there that's at 20 days already.

**Vice Chairman Miller** – Why the 20 day threshold?

**Chairman Cook** – The 20 day threshold was established after a lot of hearings and bargaining between state tax revenue folks and also the business community. There are those who would like it higher and those who would like it lower.

**Donnita Wald, General Counsel, North Dakota Tax Department** – The MTC was enacted in 1967 after there was a number of different issues that were converging. In order for multi-state tax payers and tax administrators to more easily administer the taxes, the Multi-State Tax Commission was formed. They are there to ease the burden. The commission promotes uniformity, they promote compliance with the state tax laws, but they also have been a voice for preserving state taxing authority. North Dakota is a compact member, we have been since 1969. Now a little background on what this bill is about. In the 111<sup>th</sup> congress, there was a bill introduced and actually it was the third bill introduced on this, that was introduced by industry to have congress limit the states taxing authority with respect to non-resident employees and employers. After this third bill was introduced, the Multi-State Tax Commission and industry got together and said, you know what, let's work together, we will let the MTC move along, try to enact and try to create a model act. We are aware of the issues that have come about to get us to this point.

**Donnita Wald, General Counsel, North Dakota Tax Department** - Let's start with the bill. Basically all it really does is three things. It provides an exclusion from an individual income tax for non-resident employees who spend more than 20 days in the state. It provides an income tax withholding exclusion for employers who have employees who are less than 20 days in the state. In other words, that employer doesn't have to hold North Dakota income tax. The third thing it does, it provides exclusion for those non-resident employees to file income tax returns and pay the tax on those. Section 1 of the bill, all that really does is amend current employer withholding requirements. Section 2, the meat of this starts on page 2, the exclusion for the North Dakota source income that I referred to earlier begins on page 2 and goes to line 7 on page 3. Subsection 1 is exclusion from state income tax and that applies if that non-resident has no other North Dakota source of income, they are in the state less than 20 days, and the non-resident state gives us the same opportunity. So there is a reciprocity provision. If say for instance Minnesota does not have this particular provision, then their non-resident employees cannot get this exclusion in North Dakota. There are also exclusions for people of prominence. The next exclusion from that are persons performing construction services to improve real property. Because they are in and out of states there was some concern about having to track those and we know there is a lot of out-of-state employees for construction companies that are moving back and forth. If you are a key employee, the key employee regulations under the internal revenue code are pretty complicated. Really what it is, are individuals who are high end salaried people. The last one is an employee of a non-corporate employer who would be a key employee. So that would be your partnerships, LLCs, etc. The one thing that I do what to emphasize to the committee is that this act only provide an exclusion under certain circumstances, and that is the 20 day threshold. But, it doesn't really take away our jurisdiction to tax. The next part of this bill is on page 3 lines 8 through 16. That is if non-resident employee meets all those conditions in the previous section, that is the exclusion from having to file an income tax return or having to pay income taxes on those dollars earned in North Dakota. The employer withholding exclusion starts on page 3 lines 17 through 31. This exemption to withholding is for employers who have employees meeting that 20 day threshold and are not highly paid, and that says that if you have one of those employees, you do not have to withhold from that employees wages, North Dakota income taxes.

**Chairman Cook** – Is North Dakota's current exclusion for employer withholding? Are they required to withhold after day one?

**Donnita Wald, General Counsel, North Dakota Tax Department – Yes**

**Chairman Cook – Not all states do though, right?**

**Donnita Wald, General Counsel, North Dakota Tax Department – No, not all states do. There are some states that have 14 day thresholds, some have a 10 day threshold.**

**Chairman Cook – And the threshold for an employer having to withhold could be different than what the threshold is for an employee who has to pay. Is it possible for an employee to be in another state for 7 days and have a tax obligation where the employer does not have an obligation to withhold it from them?**

**Donnita Wald, General Counsel, North Dakota Tax Department – No, not as far as I'm aware. Going back to the exclusion for the employers withholding, they must include all the days that they are present and performing work in the state and they must do that even if the employer is doing it for a related company. A lot of affiliates will move their employees back and forth and the states have recognized that in order to avoid the 20 days, they may too move their employees in and out. Not saying that employers would do that, but being tax administrators we would want to have all of our I's dotted and T's crossed. In order for that day count not to exist, there are some exclusions, and those are the related entity exclusion. So you would aggregate all those days to determine if the 20 day threshold had been met. The next item that is of importance, I think, and that is on page 4 line 26 and that is the employer safe harbor provision. What that says is, if an employer is found to have not withheld but they should have, if they did or relied on the following documents, they will be ok. One of those is if the employer regularly maintained time in attendance system records that the employee what suppose to regularly maintain, and that employee did not record those days correctly. The other safe harbor is if the employer relied on the employees travel records that the employer requires regular maintenance of, and the last safe harbor is that there is no employer requirement but the employer relies on travel expense vouchers. Last, I want to clarify this is just an exception for the employer to income tax withholding and also with respect to the individual. We still have the right to go in and investigate that person and see if they correctly did not file or if they did not correctly withhold. So we are still maintaining some jurisdiction over the individual and employer. I want to point out the effective date, begins January 2012, and the reason for that is because we don't want employers to have to go back and count. The other thing that kind of plays with that effective date is that reciprocity provision. You have to have a state who has adopted substantially similar provisions. There was a question asked regarding the 20 day threshold and how that came about. How that came about was the bills in congress were 30 day exclusions, and that the states believed was a long time to be in a state. We felt that number was a little too high. So when the states and industry got together, industry agreed to let the states sit down and create our own model, we came up with that 20 day model. I'm not saying everyone is happy with that but we think it's fair at this point in time.**

**Chairman Cook – We have reciprocity agreements with Minnesota. Any other neighboring states?**

**Donnita Wald, General Counsel, North Dakota Tax Department – We do, with Montana.**

**Chairman Cook** – This would not change those reciprocity agreements.

**Donnita Wald, General Counsel, North Dakota Tax Department** – It does not affect those at all.

**Chairman Cook** – You mentioned the MTC is always fighting for states to have control of their own tax policy. When this issue hit congress, and you indicated it has, in your mind do you think congress had a right to even deal with it? Do you think we would have had an argument if they would have passed legislation mandating a threshold level? That they were on sound ground in doing so?

**Donnita Wald, General Counsel, North Dakota Tax Department** – As a state tax attorney and someone who has been playing with taxes for 20 plus years, I agree with the states position that congress should not be meddling in state tax policy. It's a right that's exclusively reserved for the states. I support that position.

**Chairman Cook** – This economy has changed drastically in the last 10-20 years. It's very common for people to travel frequently to work in other states which really brings light to this. Do you think maybe the fact that so many other states are facing financial difficulty, that they might be looking more at this law or their right to tax somebody on day one and their more actively pursuing people who are not paying taxes?

**Donnita Wald, General Counsel, North Dakota Tax Department** – I think that is one of the reasons that industry set forth as support for this. Although when they did file the first bill, the first sponsor in congress, the recession hadn't hit then.

**Senator Triplett** – Can you clarify that if we are giving this exemption for the first 20 days, people still own taxes somewhere right? If they aren't paying taxes to us, do they still owe taxes presumably in the state where their employer resides and vice versa if it's our employees? So we aren't letting anyone off the hook, it's just a matter of where the taxes are going, is that right?

**Donnita Wald, General Counsel, North Dakota Tax Department** – That's correct.

**Senator Hogue** – I was wondering if you could talk a little about what you think the compliance rate is on a measure like this. I think we are in a mobile society and people come and go all the time. Do you have any estimates or are there industry estimates that say of the people that would be subject to this tax, what percentage actually comply?

**Donnita Wald, General Counsel, North Dakota Tax Department** – I don't know if we would be able to find that out but we will check.

**Senator Hogue** – Can you tell us how many audits or investigations the North Dakota Tax Commissioner has done on somebody who was thought to not comply with existing law?

**Donnita Wald, General Counsel, North Dakota Tax Department** – We do a lot. We have a lot of non-residents who aren't reporting income they have earned here. We have a specific project and specific auditors who work on those issues, and we see that as a very important part of what we do, and we hope to expand that discovery.

**Senator Oehlke** – Do you work together with other agencies to track folks down? I'm thinking of Workforce Safety or Minnesota Workers Comp. I know if you go to another state to work your employer better have workers comp coverage in that state. Is that one of the ways you track folks down that may or may not be complying?

**Donnita Wald, General Counsel, North Dakota Tax Department** – Yes. We have had exchange agreements through the Federation of Tax Administrators for years. That is definitely one of the ways we find information, and the Multi-State Tax Commission too, when they do their compliance, they also have an audit committee and their auditors go out and pick companies to go out and see if they have been complying with our state law. They will audit a number of states at the same time. It saves a little time and energy and they've really got some expertise to perform these audits, savings us travel dollars.

**Senator Dotzenrod** – I'm looking on page 2, that first section starts on line 3, and goes through line 14. It says on line 5, that this income shall be excluded from state sources, state source income if... When they say shall be excluded that means for our purposes of imposing our state income tax, we are not going to count any of the income if you meet all three of these. Not just one of them but all three of these listed below have to be met, and if they are met, then you are not going to count that income.

**Donnita Wald, General Counsel, North Dakota Tax Department** – That's correct.

**Senator Dotzenrod** – The second one is pretty easy to understand. The third one is pretty easy to understand. But, I'm a little confused on number one. It says, the non-resident has no other income from sources in this state for the tax year. You mean if they have another job, if they have a second line of income, then they are not going to be excluded.

**Donnita Wald, General Counsel, North Dakota Tax Department** – That is correct. I don't know necessarily that we were thinking about having another job in North Dakota. I think that was intended to address those situations where for instance you have a non-resident who's getting rental income from North Dakota, royalty income from North Dakota, and don't realize they have a filing requirement.

**Senator Dotzenrod** – For the purposes of withholding from wages, if they are here working on commission, or here working and being paid just expenses, and no other salary, is that subject to withholding? And subject to being taxed?

**Donnita Wald, General Counsel, North Dakota Tax Department** – That would depend on the commission basis whether they are deemed an employer of the person who's paying that commission or if they truly are an agent or subcontractor. This applies only to actual wages.

**Chairman Cook** – The only thing that's changing in North Dakota law with this bill is the 20 day threshold. Is that correct?

**Donnita Wald, General Counsel, North Dakota Tax Department** – That is correct.

**Chairman Cook** – We do all of this now starting day 1. Now we will give them 20 days before we impose North Dakota income tax on them provided the state they reside in does the same for us. It looks like a complicated bill but that is what the bill does.

**Senator Triplett** – We are talking about 20 work days right?

**Donnita Wald, General Counsel, North Dakota Tax Department** – Yes

**Senator Triplett** – That is virtually a month anyway.

**Chairman Cook** asked for testimony in support of SB 2170. No one came forward.

**Chairman Cook** asked for testimony opposed to SB 2170. No one came forward.

**Chairman Cook** asked for any further testimony at all. No one came forward.

**Chairman Cook** closed the hearing on SB 2170.

# 2011 SENATE STANDING COMMITTEE MINUTES

Senate Finance and Taxation Committee  
Lewis and Clark Room, State Capitol

SB 2170  
1/25/2011  
Job Number 13411

Conference Committee

A. Rittmiller

## Explanation or reason for introduction of bill/resolution:

Relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees

## Minutes:

Committee Work

**Chairman Cook** opened the hearing on SB 2170.

**Chairman Cook** – This sets the threshold for out-of-state residents working in our state, to have 20 days before they'd have a North Dakota state tax liability. Today the current law is day one. Then there is the reciprocity agreement in there with other states that give us 20 days, those are the only states we would give 20 days to. That again, is all this bill really does. It's got a lot of language in it that's not in the law today because we start taxing immediately.

**Senator Triplett** motioned Do Pass.

Seconded by **Senator Oehlke**.

**Vice Chairman Miller** – I just don't feel comfortable with this bill.

**Chairman Cook** – It will really help us. When you travel out-of-state, let's say to a conference, and you spend 7 days there, hopefully that state will pass this same law so that you don't have to file income tax in that state. Otherwise you will.

**Senator Oehlke** – I was really comforted by the tax department's testimony, especially when I asked them about investigating this and checking up. They do it now anyhow, so they know the information. That helped me a lot because there has got to be a way to follow it, and they know how.

**Chairman Cook** – Ask the clerk to take the roll. (6-1-0)

**Chairman Cook** closed discussion on SB 2170.

Carried by **Chairman Cook**.



# 2011 SENATE STANDING COMMITTEE MINUTES

**Senate Finance and Taxation Committee**  
Lewis and Clark Room, State Capitol

SB 2170  
1/26/2011  
Job Number 13424

Conference Committee

A. R. Miller

## Explanation or reason for introduction of bill/resolution:

Relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees

## Minutes:

Committee Work

**Chairman Cook** opened discussion on SB 2170.

**Senator Triplett** – I move to reconsider the action by which we voted a Do Pass recommendation on SB 2170.

Seconded by **Vice Chairman Miller**.

**Chairman Cook** – All in favor say yea. Opposed? (7-0-0)

# 2011 SENATE STANDING COMMITTEE MINUTES

Senate Finance and Taxation Committee  
Lewis and Clark Room, State Capitol

SB 2170  
1/26/2011  
Job Number 13456

Conference Committee

A. Rittmiller

## Explanation or reason for introduction of bill/resolution:

Relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees

## Minutes:

Committee Work

**Chairman Cook** opened discussion on SB 2170.

**Chairman Cook** - I do believe we had a motion to reconsider our action already. This is the mobile workforce act. It was brought to my attention last night that we had an issue here with probably railroad workers.

**Donnita Wald, General Counsel, North Dakota Tax Department** – The information Chairman Cook received is discussing the taxation of rail or motor carrier non-resident employees. Federal law prohibits the states from taxing the non-residents income and all of that income is reported to their resident state. So, they were concerned that the mobile workforce act would somehow conflict with that. What I've done, is draft an amendment. Page 2 lines 1 through 14, it's excluded if you meet subparagraphs 1, 2, and 3 or we are prohibited under federal law or constitution, from taxing that income. Instead of being specific to the railroad workers and motor carriers, we made it broad enough to apply to any other state taxation issues that are preempted. A foot note here, is that we wouldn't have been able to do this with or without this amendment. I think it's just to clarify and to make sure that these particular constituents are satisfied.

**Senator Triplett** – Was this issue discussed when the model legislation was drafted?

**Donnita Wald, General Counsel, North Dakota Tax Department** – No, and I'm in the process of drafting an email to general council and just let her know this is what we are doing and maybe the subcommittee wants to consider this. Because it would become an issue I'm sure in other states.

**Chairman Cook** – Committee, your wishes?

**Senator Triplett** moved the amendments.

Seconded by **Senator Oehlke**.

**Chairman Cook** – All in favor say yea. Opposed? (7-0-0)

**Chairman Cook** – We have before us SB 2071 as amended.

**Senator Triplett** moved a Do Pass as Amended.

Seconded by **Senator Oehlke**.

**Chairman Cook** – Ask the clerk to take the roll. (6-1-0)

Carried by **Chairman Cook**.

# FISCAL NOTE

Requested by Legislative Council  
01/12/2011

Bill/Resolution No.: SB 2170

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2009-2011 Biennium		2011-2013 Biennium		2013-2015 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2009-2011 Biennium			2011-2013 Biennium			2013-2015 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2A. Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

SB 2170 creates a de minimus threshold for nonresident individuals who work in North Dakota on an infrequent or temporary basis. If the statutory conditions are met, the nonresident's wages attributable to work in North Dakota are exempted from income tax.

**B. Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

SB 2170, which is modeled after the Multistate Tax Commission's Model Mobile Workforce Statute, exempts from income tax the wages received by a nonresident individual for working in North Dakota if (1) the individual has no other income from North Dakota sources, (2) the individual works in North Dakota no more than 20 days during the tax year, and (3) the individual's state of residence provides a substantially similar exemption or does not impose an income tax.

In addition, an employer is not required to withhold North Dakota income tax from wages paid to a nonresident individual working in North Dakota if (1) the individual works in North Dakota no more than 20 days during the tax year and (2) the individual's state of residence provides a substantially similar exemption or does not impose an income tax.

If enacted, SB 2170 does not take effect until the 2013 tax year and is expected to reduce state general fund revenues by less than \$5,000 for the 2011-13 biennium.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

<b>Name:</b>	Kathryn L. Strombeck	<b>Agency:</b>	Office of Tax Commissioner
<b>Phone Number:</b>	328-3402	<b>Date Prepared:</b>	01/17/2011

Date: 1-25-11  
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2170

Senate Finance and Taxation Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Senator Triplett Seconded By Senator Oehlke

Senators	Yes	No	Senators	Yes	No
Dwight Cook – Chairman	X		Jim Dotzenrod	X	
Joe Miller – Vice Chairman		X	Connie Triplett	X	
Randy Burckhard	X				
David Hogue	X				
Dave Oehlke	X				

Total (Yes) 6 No 1

Absent 0

Floor Assignment Senator Cook

If the vote is on an amendment, briefly indicate intent:

Date: 1-26-11  
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2170

Senate Finance and Taxation Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Senator Triplett Seconded By Senator Miller

Senators	Yes	No	Senators	Yes	No
Dwight Cook – Chairman			Jim Dotzenrod		
Joe Miller – Vice Chairman			Connie Triplett		
Randy Burckhard					
David Hogue					
Dave Oehlke					

Total (Yes) 7 No 0

Absent 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Verbal vote

PROPOSED AMENDMENT TO SENATE BILL NO. 2170

Page 2, line 14, replace the period with “; or”

Page 2, after line 14 insert:

“(4) The resident’s income is exempt from taxation by this state under the United States Constitution or federal statute.”

Renumber accordingly



Date: 1-26-11  
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2170

Senate Finance and Taxation Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Senator Triplett Seconded By Senator Oehlke

Senators	Yes	No	Senators	Yes	No
Dwight Cook – Chairman			Jim Dotzenrod		
Joe Miller – Vice Chairman			Connie Triplett		
Randy Burckhard					
David Hogue					
Dave Oehlke					

Total (Yes) 7 No 0

Absent 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Verbal vote

Date: 1-26-11  
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2170

Senate Finance and Taxation Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Senator Triplett Seconded By Senator Oehlke

Senators	Yes	No	Senators	Yes	No
Dwight Cook - Chairman	X		Jim Dotzenrod	X	
Joe Miller - Vice Chairman		X	Connie Triplett	X	
Randy Burckhard	X				
David Hogue	X				
Dave Oehlke	X				

Total (Yes) 6 No 1

Absent 0

Floor Assignment Senator Cook

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**SB 2170: Finance and Taxation Committee (Sen. Cook, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2170 was placed on the Sixth order on the calendar.

Page 2, line 14, after "tax" insert "or the nonresident's income is exempt from taxation by this state under the United States Constitution or federal statute"

Renumber accordingly

2011 HOUSE FINANCE AND TAXATION

SB 2170

# 2011 HOUSE STANDING COMMITTEE MINUTES

House Finance and Taxation Committee  
Fort Totten Room, State Capitol

SB 2170  
March 2, 2011  
#14832

Conference Committee

Committee Clerk Signature

*Mary Bruckner*

## Explanation or reason for introduction of bill/resolution:

A bill relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees; relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees; and to provide an effective date.

## Minutes:

*See attached summary of engrossed SB 2170.*

**Senator Cook:** Introduced bill. This bill will not affect a single North Dakota resident directly but it could indirectly. It deals with at what point do we impose income tax liability on out of state workers in the state of North Dakota. It is referred to as the mobile workforce act and this is a piece of model legislation that has been drafted by the multi state tax commission. All states that impose income tax also impose our income tax liability on out of state workers when they work in our state. When we travel to other states whether it's for a legislative conference or other kind of duty we are also subject to the state's income tax laws. Generally that tax is imposed on day one. My guess is that every one of us who has attended an out of state meeting we have incurred a tax liability and probably didn't know it. You can imagine with our changing economy you have many multi state corporations and people that travel all over and it becomes a real nightmare trying to determine income tax liability in other states. This bill imposes a 20 day threshold for what point out of state workers would have to meet before their tax is imposed in our state. A resident from another state coming in to our state would not be subject to our income tax liability unless they have worked here for 20 days provided that their state had the same threshold for our workers. That's how it could indirectly affect every one of us. This is an issue that has surfaced in congress where it picked up the mobile workforce act. Congress has legislation that is trying to set the threshold and I consider that in infringement on the sovereign rights of states to impose their own tax policy. My involvement through the NCSL Executive Task Force and Telecommunications and Tax Policy, we have addressed this issue and we have been opposed to the federal mandate imposing a threshold on us. We have supported the multi state tax commission's work to come up with model legislation and this is it. The bulk of the bill is on page 2 where you have to be in the state for 20 days and the state you come from has to have the same threshold for us.

**Representative Shirley Meyer:** This is a huge piece of legislation for my area where we have so many out of state workers. What happens in the event in our drilling rigs where they work two weeks on and two weeks off, do these days have to be contiguous?

**Senator Cook:** Twenty days in a calendar year.

**Representative Shirley Meyer:** Say you're an employer and withholding tax; do they have a tax liability also in their state plus in North Dakota? Do you have to withhold for two different states?

**Senator Cook:** You would get credit if you worked in another state for more than 20 days if that state met the stipulation and you paid income tax to those 20 days then you would be able to deduct that from your income tax liability in North Dakota. You would not be double taxed on the same revenue.

**Representative Lonny B. Winrich:** Are we looking forward to some sort of water's edge exemption for individuals here?

**Senator Cook:** I would hope not. One state this would not apply to is Minnesota. We have another threshold with them and that would be 365 days.

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** Reviewed the bill. All the bill does is three things; it provides that 20 days safe harbor for nonresident employees who work in North Dakota. It also provides an exclusion for those same workers from the filing and paying of North Dakota income tax if they have no other North Dakota source income. The third thing it does is provide exclusion for employers from the withholding requirements. There are some exceptions to all this as there usually are and if you go to page 2 of the bill this is really the meat of the mobile workforce act. It is limited in its application. This 20 day safe harbor for nonresidents does not apply to certain highly paid professionals listed on line 17. There is an exception for workers doing construction work on real property although it is not really applicable to workers in North Dakota. The other big exception is for key employees of corporations and non-corporate entities who come to North Dakota for whatever purpose. Say if Bill Gates comes to North Dakota to speak at a seminar and he makes more than \$160,000 a year he is subject to North Dakota income taxes, even if he is here for two hours. Now if you go to page 3 lines 10-15 that is where we say if you are here less than 20 days you do not have to file and pay North Dakota income tax. This exception only applies if you do not have any other North Dakota income. The employer does not have to withhold for that employee and they don't have to withhold North Dakota income taxes. The employer has to know whether to withhold or not and so on page 4 and 5 it tells the employer how to count the 20 days and on what documents they can use to count the 20 days. If the employer was somehow supposed to withhold and didn't but he used these documents as a basis to determine that 20 days and those documents are listed on pages 4 and 5 then the employer is not subject to penalty and interest. The second thing an employer can rely on is the travel records. For an example, say I work for General Motors Corporation and I'm in North Dakota for 10 days on behalf of Chevrolet then I come to North Dakota and am in the state on behalf of Cadillac for five days, that is 15 days and you would count those together because they are related entities, they are all owned by the same parent. But if I'm in the state on behalf of Cadillac

for 15 days and I've exceeded that 20 day threshold now I'm subject to North Dakota income taxes. There is a delayed effective date which was put in the bill to give employers and everybody else some time to get on board and learn what is going on and get their records in order.

**Vice Chairman Craig Headland:** If I work for Cadillac and then get a better offer from Chrysler and come back 10 days for them that is not the same entity but it's similar so does this bill address that?

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** You would be subject to income tax because you were here for more than 20 days.

**Representative Shirley Meyer:** Say you have a professional athlete that comes in and is paid millions, what is their income tax liability for North Dakota? Is it based on the game they play that day or what they are paid for that event or can we tax their entire income?

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** It would be based on the income he earned while in the state.

**Representative Shirley Meyer:** That is how your professional athletes are determined as they are not paid by game?

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** It would be a portion of their salary.

**Representative Shirley Meyer:** How many states have the 20 days?

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** Right now the MTC has been working on this project for over two years and industry and payroll representatives introduced a bill in Congress. After many discussions we jointly decided that the MTC would work on this project. So far no state has implemented this particular uniform provision; however, there are some states that already provide an exclusion and that ranges anywhere from 10 or 14 days. In North Dakota if you are in the state for one day and earn \$1.00 if we find you then you are subject to North Dakota income tax.

**Representative Glen Froseth:** We have some oil field consultants that come in to North Dakota and earn probably \$1500 or \$2000 a day. If they come in for 10 days then this is going to amount to quite a bit of lost income tax revenue? How is an employer supposed to know if someone comes in and works 15 days if they don't have mineral royalties that they get income from or has land and earns money from that?

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** We do not require them to know if there is income. All the employer has to do is know what that employee is doing in that state and make his calculation based on that. When you look at the consultant working in the state for a day and making \$16,000 and in working their salaries through the calculation it really doesn't end up being that much.

**Representative Dave Weiler:** In response to Representative Shirley Meyer's question about professional athletes, they are paid per game. If they play 82 games a year and they play two of them in North Dakota their salary is divided up into 82 pieces. Are these companies that come in for 10 days aware of this that they are supposed to pay state income tax?

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** If you look at the executives from the oil and gas industry I'm sure they have accountants who are well aware of the requirement. It's really not those that are highly paid that are the issue, it's people really like you and I who travel occasionally but not more than 20 days that we are trying to exempt from this.

**Representative Steven L. Zaiser:** Is the Tax Department going to be prepared to answer an array of questions from a variety of business people that may have one or two people in that situation in a year?

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** We have newsletters, tax publications, etc. that do reports on these kinds of things. I think that because we are the first state to adopt this kind of proposal that it will make some news. Tax preparers and executives around the United States are very well aware of what other state's tax laws are and that is why I have a job.

**Representative Wayne Trottier:** People that live on bordering states that work in North Dakota, do they have a choice to pay in either state?

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** With a South Dakota, North Dakota issues that South Dakota person is supposed to pay income taxes in North Dakota. We have a reciprocity provision with Minnesota so all their income is taxed in Minnesota and if a North Dakota person works in Minnesota they will pay North Dakota income tax. We also have a reciprocity provision like this with Montana.

**Representative Glen Froseth:** If an oil company sends a consultant in to work 15 days then he pays no tax on that income and then that company will send another consultant in to work for 15 days, is this income earned in North Dakota or another state?

**Donnita Wald, General Counsel for Office of State Tax Commissioner:** That employee is supposed to pay North Dakota income tax and what they end up doing is paying income taxes on all their income in the other state but they get a credit against their income tax in the other state for the tax they paid here. Under this bill if you have a worker here for 15 days and have another employee in for 15 days from the same company this bill will kick in. We have that compliance issue right now with transient workers who are in the state for short periods of time. This has always been a compliance issue for us. Right now we are trying to expand our discovery. This is going to apply only if that other state has this same provision so that really limits the application of this. We have a two page explanation on what the bill does if you would like to have this. See attached summary of engrossed SB 2170.

**Chairman Wesley R. Belter:** No further testimony. Closed hearing on SB 2170.



# 2011 HOUSE STANDING COMMITTEE MINUTES

House Finance and Taxation Committee  
Fort Totten Room, State Capitol

SB 2170  
March 7, 2011  
#15033

Conference Committee

Committee Clerk Signature

*Mary Brucher*

## Explanation or reason for introduction of bill/resolution:

A bill relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees; relating to the imposition of individual income taxes and employer income tax withholding for mobile workforce employees; and to provide an effective date.

## Minutes:

*No attachments.*

**Vice Chairman Craig Headland:** I would move a DO PASS.

**Representative Lonny B. Winrich:** Seconded.

**Representative Shirley Meyer:** Just so I'm clear with this, we are the only state that does this? There are no other states that we are going to reciprocate with currently under this model legislation?

**Chairman Wesley R. Belter:** No. Is that what he said?

**Representative Shirley Meyer:** Yes.

**Chairman Wesley R. Belter:** Okay, that's what it is then.

**Representative Shirley Meyer:** I guess my thought there is why will we do it then?

**Chairman Wesley R. Belter:** We are leaders.

**Representative Lonny B. Winrich:** As I understood Senator Cook this is a model bill from the multi-state tax commission and we are simply the first state legislature to take it on. I think it is probably under consideration in other states as it comes out of this multi-state commission.

**A roll call vote was taken: YES 11 NO 3 ABSENT 0  
MOTION CARRIED FOR DO PASS.**

**Representative Lonny B. Winrich will carry SB 2170.**

Date: 3-7-11  
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2170

House Finance and Taxation Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Rep. Headland Seconded By Rep. Winrich

Representatives	Yes	No	Representatives	Yes	No
Chairman Wesley R. Belter	✓		Scot Kelsh	✓	
Vice Chair. Craig Headland	✓		Shirley Meyer	✓	
Glen Froseth	✓	✓	Lonny B. Winrich	✓	
Bette Grande	✓		Steven L. Zaiser		✓
Patrick Hatlestad	✓				
Mark S. Owens	✓				
Roscoe Streytle	✓				
Wayne Trottier	✓				
Dave Weiler	✓				
Dwight Wrangham		✓			

Total (Yes) 11 No 3

Absent 0

Floor Assignment Rep. Winrich

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**SB 2170, as engrossed: Finance and Taxation Committee (Rep. Belter, Chairman)**  
recommends **DO PASS** (11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING).  
Engrossed SB 2170 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

SB 2170

## **Summary of Engrossed Senate Bill No. 2170**

### **Purpose of the Proposed Legislation:**

The purpose of Engrossed Senate Bill No. 2170 is to create 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 and to amend section 57-38-59 to include a reference to the new section.

### **Proposed Statutory Language:**

#### **SECTION 1:**

A reference to the proposed new section to chapter 57-38 is included in this amendment.

#### **SECTION 2:**

##### **Subsection 1: Exclusion from Computation of Taxable Individual Income**

Compensation received by a nonresident for employment duties in North Dakota will be excluded from state source income if:

- 1) The employee does not have any other North Dakota income,
- 2) The employee does not spend more than 20 "working days\*" in North Dakota, and
- 3) The employee's home state provides a substantially similar withholding exception, does not impose an individual income tax, or the employee's income is exempt from taxation by this state under the United States Constitution or a federal statute.

\* Any portion of a day constitutes one "working day" unless an individual is merely traveling through the state.

This subsection does not apply to North Dakota source income received by:

- 1) Professional athletes or team members,
- 2) Professional entertainers,
- 3) Persons of prominence,
- 4) Construction workers,
- 5) "Key employees" under IRC § 416(i) who generally have a salary of at least \$160,000 and are one of the 50 highest paid officers, or
- 6) An employee of a noncorporate employer who is not an officer but otherwise meets the "key employee" requirements under IRC § 416(i).

constructively, at least fifty percent of the value of the corporation's outstanding stock.

If an employer fails to withhold due to a miscalculation of the number of days the employee was in the state the employer will not be penalized if the number of days was calculated based on:

1. The employer's time and attendance system,
2. An employee's travel records that the employer required the employee to maintain, or
3. An employee's travel expense reimbursement records if no other records are available.

Nothing in this subsection interferes with North Dakota's jurisdiction to impose this or any other tax on any employer.

This subsection does not interfere with any other state agreement under section 57-38-59.1 nor does it interfere with North Dakota's jurisdiction to impose this or any other tax on any taxpayer.

**Subsection 2: Exception from Individual Income Tax Filing and Payment**

If a nonresident employee's compensation is excluded from source income under subsection one the nonresident employee is not required to file a return or pay tax on their North Dakota income. The Tax Commissioner retains the ability to require any nonresident employee to file an information return.

Nothing in this subsection interferes with North Dakota's jurisdiction to impose this or any other tax on any taxpayer.

**Subsection 3: Exception from Employer Withholding from Compensation**

An employer is not required to withhold from a nonresident employee's compensation if the compensation is excluded from North Dakota source income under subsection one without regard to whether the employee has income from other sources in the state.

For purposes of this subsection a "working day" includes all days the nonresident employee is present in North Dakota performing employment duties for their employer or any other "related person".

A "related person" includes:

- 1) A related entity,
- 2) A component member as defined in IRC § 1563(b),
- 3) A stock holder, or
- 4) Any person with a similar relation to the employer as those listed above.

A "related entity" means:

- 1) An individual stockholder or member of the stockholder's family,
- 2) 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
- 3) 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