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REPORT
115–180

MOBILE WORKFORCE STATE INCOME TAX SIMPLIFICATION ACT OF 2017

JUNE 15, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1393]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1393) to limit the authority of States to tax certain income of employees for employment duties performed in other States, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

The Mobile Workforce Act provides a clear, uniform framework for when states may tax nonresident employees who travel to the taxing state to perform work. In particular, the bill prevents states from imposing income tax compliance burdens on nonresidents who work in a foreign state for 30 days or fewer in a calendar year.

Background and Need for the Legislation

Forty-three states and the District of Columbia levy a personal income tax on wages and partnership income.[1] The state tax laws that determine when a nonresident must pay a foreign state's income tax, and when employers must withhold this tax, are numerous and varied.[2] Some have a days worked in-state threshold. For example, for 2014, a nonresident is subject to tax after working fifty-nine days in Arizona, fifteen days in New Mexico, and fourteen days in Connecticut.[3] Others have a *de minimis* exception to employer withholding requirements based on wages earned. That threshold is $1,500 in Wisconsin, $1,000 in Idaho, $800 in South Carolina, and $300 a quarter in Oklahoma.[4] Additional states with withholding thresholds include Georgia, Hawaii, Maine, New Jersey, New York, North Dakota, Oregon, Utah, Virginia, and West Virginia. Some state thresholds are tied to personal exemption, standard deduction, or filing thresholds that can change each year. The remainder of relevant states tax income earned within their borders by nonresidents, even if the employee only works in the state for one day. Examples include New York, even though the state obligates employers to withhold wages only after fourteen days.[5]

Some of these states exempt particular activities, such as training or professional development. Yet these exemptions will sometimes cover only the withholding requirement. The employee may still be required to file.

These complicated rules impact everyone who travels for work and many industries, including the retail, manufacturing, real estate, technology, food, services, and consulting industries. At the Subcommittee on Regulatory Reform, Commercial and Antitrust Law's 2014 hearing, a West Virginia tax practitioner described the burden on his construction and electrical linemen clients who travel frequently for short-term projects. He reported filing income tax returns in as many as ten different states in a year for these workers.[6] At the Subcommittee's 2015 hearing, a building products company executive testified that the patchwork of laws resulted in the company issuing fifty W–2's to a single employee for a single year.

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[1] *Mobile Workforce State Income Tax Simplification Act of 2011: Hearing on H.R. 1864 Before Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011) [hereinafter the "2011 Hearing"] (testimony of Jeffrey A. Porter, Owner, Porter & Associates, CPAs, on behalf of the American Institute of Certified Public Accountants).

[2] *Id.*

[3] *Mobile Workforce State Income Tax Simplification Act of 2013: Hearing on H.R. 1129 Before Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. 33–39 (2014) (statement of Jeffrey A. Porter, Owner, Porter & Associates, CPAs, on behalf of the American Institute of Certified Public Accountants).

[4] *Id.*

[5] New York State Department of Taxation and Finance, *Withholding on Wages Paid to Certain Nonresidents Who Work 14 Days or Fewer in New York State* (July 2012), *http://www.tax.ny.gov/pdf/memos/income/m12_5i.pdf.*

[6] Porter, *supra* note 3.

The executive also noted, regarding the compliance burden, that "many of our affected employees make less than $50,000 per year and have limited resources to seek professional advice."[7]

States generally allow a credit for income taxes paid to another state. However, it is not always dollar-for-dollar when local taxes are factored in. Furthermore, such credits provide no relief to residents of the nine states that do not impose income taxes. Such individuals have been found to bear an overall tax burden comparable to residents of states that do impose state income taxes and thus are effectively subject to double taxation.[8]

There are substantial burdens on employers as well. For example, they must determine whether to withhold for a nonresident working in a particular state, which can be complicated. Georgia, for example, has a three-part test looking at whether an employee has worked there for twenty-three days in a calendar quarter, whether more than five percent of the employee's income is attributable to work in Georgia, or whether the employee has received remuneration for services in Georgia that exceeds $5,000.[9]

Temporary work assignments also require the employer to register for a withholding account, which can be "just as burdensome as trying to manage the tax itself."[10] Employers must also track employees' work locations and time spent, which is often a manual process.

Large businesses may have more resources, but they are also more tightly regulated. The Sarbanes-Oxley Act of 2002 requires management to sign-off on the internal controls that ensure state tax compliance and requires auditors to certify management's assessment.[11] The diversity of state income tax laws requires public companies and their auditors to invest a significant amount of time ensuring that the company has withheld correctly for each employee, at great expense to the firm.[12]

In short, as a witness told the Subcommittee in 2014, "[b]usinesses, including small businesses and family businesses, that operate interstate are subject to significant regulatory burdens with regard to compliance with nonresident state income tax withholding laws."[13] These burdens raise costs, which are typically passed on to customers.

The result is a significant burden on interstate commerce. Professor Walter Hellerstein testified in 2007 that states have a legitimate interest in assuring that workers earning income in a state "pay their fair share . . . for the benefits and protections that the State provides." However, that interest "has to be balanced against the burdens that are imposed on multi-state enterprises and on the

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[7] *Mobile Workforce State Income Tax Simplification Act of 2015: Hearing on H.R. 2315 Before Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 114th Cong. 1–5 (2015) (written testimony of Lawrence F. Leaman, Vice President of Taxes, Masco Corporation).

[8] *Mobile Workforce State Income Tax Simplification Act of 2013: Hearing on H.R. 1129 Before Subcomm. on Regulatory Reform, Commercial and Antirust Law of the H. Comm. on the Judiciary,* 113th Cong. 42–72 (2014) (statement of Lori Brown, CPP, Director, Disbursements CACI International, Inc.).

[9] Porter, *supra* note 3.

[10] Brown, *supra* note 8.

[11] Sarbanes-Oxley Act of 2002, Pub. L. 107–204, § 404, 116 Stat. 745, 789 (codified at 15 U.S.C. § 7262) (2002).

[12] *2007 Hearing, supra* note 4, at 10 (statement of Rep. Henry "Hank" Johnson).

[13] *2011 Hearing,* supra note 1, at 13 (testimony of Jeffrey A. Porter, Owner, Porter & Associates, CPAs, on behalf of the American Institute of Certified Public Accountants).

conduct of interstate commerce by uncertain, inconsistent, and unreasonable withholding obligations imposed by the State."[14]

I. HOW THE MOBILE WORKFORCE ACT SIMPLIFIES THE STATE INCOME TAX LAW REGIME

The Mobile Workforce Act would substantially simplify state income tax laws by imposing a uniform standard for nonresident taxation and employer withholding. The bill provides that an employee is not subject to income tax in a nonresident state unless the employee has worked for more than thirty days in that jurisdiction.[15] This threshold is not continuous, so an employee that makes a number of short business trips to a state might still cross it. Once tripped, the withholding obligation is retroactive to the first day worked in the state.

The bill further provides that an employer is not responsible for withholding on behalf of any employee who is not subject to a state income tax as a result of the bill.[16] For purposes of determining penalties related to a failure to report or withhold, employers are entitled to rely on their employees' report of days spent in a nonresident state unless the employer voluntarily uses a time and attendance system to track its employees' whereabouts.[17]

The bill exempts certain professional athletes, entertainers, and public figures who, because of their prominence, are paid on a per appearance basis. (*i.e.,* they will not receive the 30-day exemption.)[18] The rationale is that individuals like musical performers and professional athletes earn income specifically from playing at a venue in the foreign state. By contrast, in most situations even a highly-paid employee's temporary presence in a foreign state is typically incidental to that employee's job. In a change from prior versions of the bill, the professional entertainer exemption is narrowed from a "person who performs services" to a "person *of prominence* who performs services" in order to ensure that other entertainers retain the benefit of the bill's protections.

Finally, new language in H.R. 1393 expands the list of exclusions to cover a fourth category, "qualified production employees." Like professional entertainers and athletes, these employees also earn income from their work in specific states, many of which offer tax credits for local productions. The new language excludes these employees, who perform services in connection with film, television or other video productions, if the associated tax credits are contingent on withholding wages earned in the state.

II. OTHER CONCERNS

Some state revenue departments have suggested that the bill is inconsistent with the source principle that income should be taxed where it is earned. The bill, however, is intended simply to bring uniformity to a small set of *de minimis* exceptions, in order to reduce compliance costs. Nor is it clear that income is earned in a state just because an employee is there. For example, if an Illinois

[14] *2007 Hearing, supra* note 4, at 71 (statement of Walter Hellerstein, Francis Shackelford Distinguished Professor of Taxation Law, University of Georgia School of Law).
[15] Mobile Workforce State Income Tax Simplification Act of 2015, H.R. 2315 § 2(a), 114th Congress (2015).
[16] *Id.* § 2(b).
[17] *Id.* § 2(c).
[18] *Id.* § 2(d)(2).

businessman flies to Manhattan to sign a deal with a New York City developer to acquire a building in Florida, it is fair to question whether the associated income is earned more in New York than in Florida or Illinois.

Indeed, an analysis from Ernst & Young, LLP, who offered as testimony in the 111th Congress, found that the bill's revenue impact is minimal. In particular, it predicted a net revenue change nationwide for states of merely one hundredth of one percent (.01%), which translates into a $42 million overall reduction in personal income taxes.[19] A July 9, 2015 update to that analysis found nearly identical results.[20] This seems reasonable, since for every nonresident whose income tax a state loses, the state gains from not having to provide a credit to in-state residents who temporarily work and therefore currently pay taxes out of state. The result should approximately be a wash. The benefit is in reducing complexity and compliance burdens.

The Committee has been informed of an industry estimate that New York may lose between $50 and $100 million in revenue after enactment of the bill. But the bill does not significantly alter the overall amount of income tax collected. The size of the pot remains virtually the same. It is the apportionment that differs, which is appropriate in order to reduce compliance burdens and retain sensible limits on state regulatory authority over nonresidents.

The Committee is also aware that approximately one-third of the states have entered into reciprocity agreements not to tax each other's border-state residents' wages. But this still leaves two-thirds of the country not covered, and the existing agreements are geared toward regular commuters living on state borders, rather than workers traveling to multiple locations for temporary work.

At previous Subcommittee hearings, witnesses representing state revenue departments raised a number of arguments centered on potential fraud and gaming of the system.[21] For example, concerns were raised over provisions permitting employers to rely on employees' estimates of time spent in other jurisdictions. This "voluntary reporting" was claimed not to have been effective in the income tax enforcement context. However, this allowance is made only for purposes of calculating employer penalties, not for determining the amount actually owed.[22]

More importantly, unlike in the general income tax context, there is little motive here for fraud or gaming. The amount of money at issue (taxes on less than thirty days' wages) is minimal. Second, except in nine states, the employee will have to pay the tax in any event to the employee's home state, so the only savings would be from minor rate differentials between the two jurisdictions.

[19] *Mobile Workforce State Income Tax Simplification Act of 2013: Hearing on H.R. 1129 Before Subcomm. on Regulatory Reform, Commercial and Antirust Law of the H. Comm. on the Judiciary,* 113th Cong. 14–30 (2014) (statement Maureen B. Riehl Vice President, Government Affairs Council On State Taxation (COST)).

[20] Ernst & Young LLP, *Estimates of State-By-State Impacts of The Mobile Workforce State Income Tax Fairness And Simplification Act Prepared for The State Tax Research Institute* (Jul. 9, 2015), http://www.cost.org/WorkArea/DownloadAsset.aspx?id=90612.

[21] *Mobile Workforce State Income Tax Simplification Act of 2013: Hearing on H.R. 1129 Before Subcomm. on Regulatory Reform, Commercial and Antirust Law of the H. Comm. on the Judiciary,* 113th Cong. 75–82 (2014) (Patrick Carter Director, Division of Revenue for the State of Delaware).

[22] Mobile Workforce State Income Tax Simplification Act of 2017, H.R. 1393 § 2(c), 115th Congress (2017).

Hearings

The Committee did not hold a hearing on H.R. 1393. However, this bill is nearly identical to the House-passed version of the Mobile Workforce State Income Tax Simplification Act of 2015 (H.R. 2315). The Committee's Subcommittee on Regulatory Reform, Commercial, and Antitrust Law held one day of hearings on that and other tax bills on June 2, 2015. Testimony was received from Mr. Grover Norquist, President, Americans for Tax Reform; Mr. Douglas L. Lindholm, CEO & Executive Director, Council on State Taxation; Mr. Lawrence F. Leaman, Vice President, Taxes, Masco Corporation; Ms. Julie P. Magee, Commissioner, Alabama Department of Revenue; and Mr. Dan L. Crippen, Executive Director, National Governors Association.

Committee Consideration

On March 22, 2017, the Committee met in open session and ordered the bill H.R. 1393 favorably reported, without amendment, by a roll call vote of 19–2, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 1393:

1. Motion to report H.R. 1393 favorably to the House. Agreed to by a rollcall vote of 19 to 2.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Issa (CA)			
Mr. King (IA)			
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)			
Mr. Poe (TX)	X		
Mr. Chaffetz (UT)	X		
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)			
Mr. DeSantis (FL)			
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Ms. Roby (AL)	X		
Mr. Gaetz (FL)			
Mr. Johnson (LA)	X		
Mr. Biggs (AZ)	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)	X		
Mr. Lieu (CA)			
Mr. Raskin (MD)			
Ms. Jayapal (WA)			
Mr. Schneider (IL)	X		
Total	19	2	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1393, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 10, 2017.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1393, the Mobile Workforce State Income Tax Simplification Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Aurora Swanson (for federal costs), who can be reached at 226–2860, and Jon Sperl (for intergovernmental mandates), who can be reached at 225–3220.

Sincerely,

KEITH HALL,
Director.

Enclosure.

cc: Honorable John Conyers Jr.,
Ranking Member

H.R. 1393—Mobile Workforce State Income Tax Simplification Act of 2017.

As ordered reported by the House Committee on the Judiciary on March 22, 2017.

H.R. 1393 would establish consistent criteria for states to determine state taxation and employer withholding for nonresidents who work in a state. CBO estimates that enacting H.R. 1393 would have no direct effect on the federal budget. Enacting H.R. 1393 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 1393 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1393 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) by prohibiting a state from taxing the income of employees who work in the state for fewer than 31 days. (The prohibition would not apply to the income of professional athletes, entertainers, some production employees, or public figures.) UMRA includes in its definition of mandate costs any amounts that state governments would be prohibited from raising in revenues as a result of the mandate.

Because most states that levy a personal income tax allow residents to take a credit for income taxes that the residents pay to another state, the cost of the mandate would equal, for all states collectively, the difference between the amount of revenue that they would lose from nonresidents who work in the state for fewer than 31 days and the amount of revenue they would gain from residents whose credits for payments to other states would be lower under the bill.

Generally, states that have large employment centers close to a state border would lose the most revenue; states from which employees tend to commute would gain revenue. For example, Illinois, Massachusetts, California, and New York would face losses, with New York probably losing the largest amount of revenue—between $55 million and $120 million per year, according to state and industry estimates. In contrast, New Jersey would probably gain revenue. Because states tax income at different rates and on different tax bases, the changes in tax revenues nationwide would not net to zero.

On the basis of information from officials in a number of states, analysis of state tax data, and an analysis by Ernst & Young, CBO estimates that, for all states collectively, the bill would reduce net revenues by $55 million to $100 million per year beginning in 2020, the first full year that the bill's changes would be in effect. That range stems from the underlying uncertainty about the amount of revenue that states collect from nonresidents and the amount they would receive from residents whose credits would be lower under the bill. CBO endeavors to develop estimates that are in the middle of a range of possible outcomes. On that basis, CBO has determined that the net cost of the intergovernmental mandate would be $78 million in 2020 and thus would not exceed the annual threshold established in UMRA in any of the first five years that the mandate becomes effective. (In 2017 the threshold is $78 million, and it is adjusted annually for inflation; in 2020, the threshold would be $84 million.)

H.R. 1393 contains no private-sector mandates as defined in UMRA.

The CBO staff contacts for this estimate are Aurora Swanson (for federal costs) and Rachel Austin (for intergovernmental mandates). This estimate was approved H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1393, provides a clear, uniform framework for when states may tax nonresident employees who travel to the taxing state to perform work.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1393 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title. Provides that the bill may be cited as the "Mobile Workforce State Income Tax Simplification Act of 2017."

Section 2. Limitations on State Withholding and Taxation of Employee Income

Subsection (a): A state may not subject nonresidents to personal income tax unless the nonresident is "present and performing employment duties" for more than 30 days in the calendar year in which "the wages or other remuneration is earned."

Subsection (b): No employer withholding or reporting requirement for nonresidents may be imposed unless the 30-day trigger is met, but once triggered, it is retroactive to Day 1 of the employees' work in-state.

Subsection (c): *For purposes of determining penalties* related to employers' failures to withhold or report, employers may rely on an employee's determination of the time spent in a nonresident state, unless (1) there is known employee fraud or collusion to avoid taxation between the employer and employee; OR (2) the employer voluntarily "maintains a time and attendance system that tracks where the employee performs duties on a daily basis," in which case that data must be used to determine penalties related to the employers' withholding and reporting requirements.[23]

Subsection (d): Defines relevant terms. Of particular note:

(1) Working in a state for a "Day" means that the employee performs more of the employee's employment duties within such state than in any other state during that day. However, if the employee worked only in the employee's state of residence and in *one* nonresident state during that day, it is counted as a nonresident day regardless of the time spent in each. Transit time is excluded from these calculations.

(2) "Employee" is defined according to state law consistent with state sovereignty principles. The term does not include a professional athlete, entertainer, qualified production employee, or certain public figures.

(4) "Professional Entertainer" is defined as a "person of prominence who performs services in the professional performing arts . . . on a per-event basis" and whose remuneration is for providing such services.

(5) "Qualified Production Employee" is defined as a person who provides production services in connection with a state approved film, television or other commercial video production whose wages must be withheld as a condition of such production costs qualifying for the state's film incentive program.

(6) "Certain Public Figures" are defined as persons of prominence who perform services in the nature of a speech, public appearance, or similar event on a per-event basis and whose remuneration is for performing such services.

(7) "Employer" is defined by state law unless the state provides no definition, in which case federal law controls. Again, this is consistent with state sovereignty principles.

(9) "Time and Attendance System" means a system that requires employees to record, contemporaneously, any out-of-state locations where they work, if designed and used by their employer to allocate employees' wages among states for income tax purposes.

(10) "Wages or Other Remuneration" is left to the states to define.

Section 3. Effective Date; Applicability. The Act is effective on January 1 of the second calendar year after the date of enactment and does not apply to any tax obligation accrued before that date.

Dissenting Views

We agree with the sponsors of H.R. 1393, the "Mobile Workforce State Income Tax Simplification Act of 2017," that a uniform framework specifying when an employer must withhold state in-

[23] This description covers Paragraphs (c)(1) and (c)(3). Paragraph (c)(2) merely underscores that the employer may rely on the employee, even if it could theoretically gather the necessary information from its records, provided that the employer does not maintain a specific tracking system described in Paragraph (c)(3).

come tax could help ensure simplicity and be more administrable than the current varied state standards.[1] However the means by which H.R. 1393 achieves this result would lead to significant state revenue losses. Specifically, the bill's 30-day threshold is simply too long and, as drafted, could facilitate manipulation. Our concerns are shared by a broad coalition of labor and tax organizations, including the Federation of Tax Administrators, and the Multistate Tax Commission.[2]

For these reasons we must respectfully dissent and oppose H.R. 1393.

DESCRIPTION AND BACKGROUND

In an ever-increasing mobile U.S. workforce, employees often work in several states throughout the year. As a result, these employees may incur state income tax obligations in more than just their resident state and may be obligated to pay state income taxes to the state where income is earned or where the services giving rise to the income are performed.[3] Although an employee's resident state may tax all income regardless of where the income is earned,[4] the resident state typically provides a credit for any income taxes paid to other states.[5]

A total of 41 states currently collect state income taxes[6] and each has established a threshold for when an earner must pay such

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[1] *See e.g., Unofficial Tr. of Markup of H.R. 1393, the Mobile Workforce State Income Tax Simplification Act of 2017, H.R. 695, the Child Protection Improvements Act of 2017, H.R. 883, the Targeting Child Predators Act of 2017, and H.R. 1188, the Adam Walsh Reauthorization Act of 2017: Before the H. Comm. on the Judiciary,* 115th Cong. 76–78 (March 22, 2017) (statement of Chairman Bob Goodlatte (R–VA)) [hereinafter "2017 Markup"].

[2] Letter from the American Federation of Labor and Congress of Industrial Organizations, American Federation of State, County and Municipal Employees, American Federation of Government Employees, Amalgamated Transit Union, Communications Workers of America, International Association of Firefighters, International Federation of Professional and Technical Engineers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, International Union of Police Associations, National Education Association, Service Employees International Union, (March 21, 2017) (on file with the H. of Representatives Comm. on the Judiciary, Democratic Staff); Letter from Dawn Cash, President of the Federation of Tax Administrators Board of Trustees and Commissioner of the Oklahoma Tax Comm'n, to Representative Bob Goodlatte, Chairman of the H. Comm. on the Judiciary, & Representative John Conyers, Jr., Ranking Member of the H. Comm. on the Judiciary (March 13, 2017) (on file with the H. Comm. on the Judiciary Democratic staff); Letter from Gregory S. Matson, Executive Director of the Multistate Tax Comm'n, to Representative Bob Goodlatte, Chairman of the H. Comm. on the Judiciary, & Representative John Conyers, Jr., Ranking Member of the H. Comm. on the Judiciary (March 13, 2017) (on file with the H. Comm. on the Judiciary Democratic staff) [hereinafter "MTC Letter"].

[3] Shaffer v. Carter, 252 U.S. 37, 52 (1920) ("[J]ust as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein.").

[4] *See* New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937); Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932) (holding that the state has unrestricted power to tax citizens net income even if activities are carried on outside of the state).

[5] *Unofficial Tr. of Nexus Issues: Hearing on H.R. 2315, the Mobile Workforce State Income Tax Simplification Act of 2015, H.R. 1643, the Digital Goods and Services Tax Fairness Act of 2015, and H.R. 2584, the Business Activity Tax Simplification Act of 2015: Before the Subcomm. on Reg. Reform, Com. and Antitrust Law of the H. Comm. on the Judiciary,* 114th Cong. (2015)(written statement of Julie P. Magee, Commissioner of the Alabama Department of Revenue, at 5) [hereinafter the "2015 Hearing"].

[6] *Mobile Workforce State Income Tax Simplification Act of 2011: Hearing on H.R. 1864 Before the Subcomm. on Courts, Com. and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. 41 (2011) [hereinafter the "2011 Hearing"]. The following nine states do not impose an individual income tax: Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming. Although the District of Columbia may tax its residents, federal law bars it from taxing the income of non-residents. Pub. L. No. 93–198 (1973). *But see Mobile Workforce State Income Tax Simplification Act of 2013: Hearing on H.R. 1129 Before the Subcomm. on Reg. Reform, Com. and Antirust Law of the H. Comm. on the Judiciary,* 113th Cong. 33–

Continued

taxes and when the employer must withhold.[7] The thresholds generally fall into two categories at which employers must begin to withhold income for state tax purposes: a de minimus threshold, based on the number of days that the employee earned income in the state, and a physical presence threshold based on the amount of income earned in the state.[8] For example, New York requires withholding after an individual has worked 14 days within the state.[9] In contrast, Wisconsin requires withholding once the employee has earned at least $1,500 within the state.[10]

As a result of these differing thresholds, both states and employees have burdensome compliance and paperwork requirements,[11] which are particularly challenging for employees who must travel for work.[12] Accordingly, a solution that would impose a national uniform standard is urged by those who have encountered such difficulties.

H.R. 1393 seeks to address these differing standards by establishing a national uniform threshold. Specifically, it bars a state from imposing income taxes on a non-resident until the non-resident has worked more than 30 workdays within a calendar year within the state.[13] The 30-day threshold would not apply, however, to individuals with certain professions (e.g., professional athletes, prominent entertainers, qualified production employees and certain public figures), although they would still be subject to current state thresholds.[14] The bill defines what constitutes a workday to ensure that no state double counts the workday of an employee.[15]

CONCERNS WITH H.R. 1393

I. H.R. 1393 WILL RESULT IN MAJOR TAX REVENUE LOSSES FOR CERTAIN STATES

H.R. 1393's 30-day threshold would allow a non-resident employee to work six entire business weeks (or more than ten percent of the year) in another state and avoid an obligation to pay any income taxes to that state.[16] The Congressional Budget Office (CBO) stated that "H.R. 1393 would impose an intergovernmental mandate as defined by the Unfunded Mandates Reform Act" and result in major revenue losses of "between $50 million and $100 million

39 (2014) (statement of Jeffrey A. Porter, Owner, Porter & Associates, CPAs, on behalf of the American Institute of Certified Public Accountants) (contending that not 41 but 43 states impose an income tax).

[7] 2015 Hearing (written statement of Doug Lindholm, President and Executive Director of the Council on State Taxation, at 2).

[8] 2011 Hearing at 17 (written statement of Jeffrey A. Porter, speaking on behalf of the American Institute of Certified Public Accountants).

[9] *State of New York—Department of Taxation and Finance, Income/Franchise Tax—District Office Audit Manual, Withholding Tax Field Audit Guidelines,* at 24 (Sept. 17, 2004), *available at* http://www.bcnys.org/inside/tax/withholding.pdf.

[10] Wis. Stat. § 71.64(6)(b) (2015).

[11] 2015 Hearing (written statement of Doug Lindholm, President and Executive Director of the Council on State Taxation, at 2).

[12] 2011 Hearing at 2 (statement of Ranking Member Coble); *id.,* at 35 (written statement of Joseph R. Crosby, COO and Senior Policy Director for the Council on State Taxation).

[13] H.R. 1393, § 2(a)(2).

[14] H.R. 1393, § 2(d)(2) (high-income individuals are excluded from the definition of "employee" and therefore the 30-day threshold would not apply to them).

[15] H.R. 1393, § 2(d)(1).

[16] *Unofficial Tr. of Markup of H.R. 1864, the Mobile Workforce State Income Tax Simplification Act of 2011: Before the H. Comm. on the Judiciary,* 112th Cong. 94 (Nov. 17, 2011) (statement of Representative Jerrold Nadler).

per year" collectively.[17] CBO estimates that "Illinois, Massachusetts, California and New York would face losses, with New York probably losing the largest amount of revenue—between $55 million and $120 million per year, according to state and industry estimates"[18] The State of New York itself estimates that the bill will lead to a tax revenue loss of between $95 million and $120 million starting in 2017.[19] Of note, this "revenue loss is greater than the revenue impact on all other states combined."[20] Such shortfalls in tax revenues would force states to make up these losses by shifting the tax burden to resident taxpayers through increased property, income, and sales taxes, and perhaps by cutting governmental services. Unfortunately, the Committee rejected an amendment, offered by Representative Jerrold Nadler (D–NY) during the markup of the legislation, which would have shortened the threshold to a reasonable 14 days.[21]

II. H.R. 1393 HINDERS ENFORCEMENT OF INCOME TAX COLLECTION

H.R. 1393 also could prohibit an employer from withholding an employee's income taxes owed to a non-resident state. Section 2(c) of the bill provides that—for purposes of determining an employer's obligation to withhold state income taxes for an employee—an employer may rely on the employee's determination of the time the employee is expected to spend in another state during the year.[22] Thus, if the employee does not inform his or her employer about expecting to spend more than 30 work days during the calendar year in another state, this provision effectively prevents the employer from withholding an employee's state income taxes to a non-resident state. As concerned stakeholders have highlighted, "[e]ven if the employer knows where the employee has worked more than 30 days based on its own records, the employer may still rely on the employee's advance estimate; this and the immediately preceding rule would allow an employee to knowingly underestimate the expected time in-state to avoid tax, and the employer could not be held to account if it turns a blind eye, i.e. avoids actual knowledge of fraud or collusion"[23] As a result, H.R. 1393 undermines enforcement of state income tax collection.

[17] Congressional Budget Office Cost Estimate, H.R. 1393: Mobile Workforce State Income Tax Simplification Act of 2017 (April 10, 2017). The Unfunded Mandates Reform Act is intended to curb the practice of imposing federal mandates on state and local governments without adequate funding. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4, 109 Stat. 48 (1995).

[18] *Id.* The ranges of revenue losses for New York exceed the range of overall losses for the states collectively because "states tax income at different rates and on different tax bases, the changes in tax revenues nationwide would not net to zero." *Id.*

[19] Letter from Nonie Manion, Executive Deputy Commissioner, Department of Taxation and Finance, State of New York, to Representative Bob Goodlatte, Chairman, House Comm on the Jud., and Representative John Conyers, Jr., Ranking Member, House Comm. on the Jud. (March 20, 2017) (on file with the H. Comm. on the Judiciary, Democratic Staff). In his letter, Commissioner Boone details how his office calculated that figure:

Our estimate is constructed through a simulation of actual New York State nonresident tax returns from tax year 2014. Nonresident wages, the base of the estimate, are grown to tax year 2019 using the most recent forecast from the New York State Division of the Budget. We also build in a behavioral assumption regarding the actions likely to be taken by some nonresidents to stay below the 30-day threshold. Finally, the estimate includes an offset for the reduction in the resident credit New York provides to its residents who work out-of-state.

[20] *Id.*

[21] 2017 Markup at 98.

[22] H.R. 1393, § 2(c).

[23] MTC Letter.

CONCLUSION

Disparate state employment tax withholding criteria present real challenges for both states and employees. However we cannot support legislation that in its attempt to address these challenges will incidentally cause states to incur significant revenue losses. The amendment offered by Representative Nadler, which proposed to shorten the threshold period to 14 days, would have lessened this impact on state revenues while still providing the certainty proponents of the legislation seek. Had that change been made to the legislation we could have supported it. Unfortunately, absent a more reasonable threshold, we must oppose H.R. 1393.

MR. CONYERS, JR.
MR. NADLER.
MR. JEFFRIES.