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April 17, 2024

VIA EMAIL

Senator John Arch, Speaker
Nebraska Legislature

**Re: Concerns with Limitations on the Taxation of Nonresident Employees in L.B. 1023
(Final Reading)**

Dear Speaker Arch:

On behalf of the Council On State Taxation (COST), I appreciate the Legislature's proposed efforts to address the taxation of nonresident employees (including withholding obligations for their employers) when employees are working in Nebraska for limited periods of time. L.B. 1023 proposes a seven-day conference/training threshold (with a \$5,000 wage cap) before such employees are subject to the State's income tax. While this is a step in the right direction, we respectfully urge you to broaden the scope of the threshold in this legislation (or in the future) by increasing the day threshold to 30 days and by removing the \$5,000 wage cap, which is difficult to calculate and administer. We strongly encourage Nebraska to eventually adopt the attached *COST Model language, drafted and supported with the assistance of the American Institute of Certified Public Accountants (AICPA), the American Payroll Association (APA), and the greater business community.*

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 500 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Many COST members have operations in Nebraska that would be negatively impacted by this legislation.

Nonresident Taxation Becoming an Increasing Problem

Every day, hundreds of thousands of employees across the country work in states where employees are not residents, which is a greater factor during and after the recent COVID-19 pandemic. Most of this work is temporary in nature, with nonresident employees conducting limited business in the State for short periods of time. While the provisions in L.B. 1023 provide some limited assistance to nonresident employees who travel to Nebraska for business purposes, it still does not go far enough to remove onerous administrative burdens on those employees and their employers (who are required to withhold the tax from their pay checks).

\$5,000 Wage Cap is Troublesome and Creates Compliance Burdens

The dollar threshold of \$5,000 and the conference/training limitation in L.B. 1023 substantially decreases the number of workers protected from the safe harbor. This is particularly difficult from a compliance perspective because many workers are paid on a commission basis and/or earn a year-end bonus that may or may not reflect work conducted in a specific state. Employers similarly have no

guidance on how much to withhold for work done in the current year in Nebraska, since commissions and bonuses are not paid until the end of the year, and they may not know exactly what type of work an employee was engaged in during that period. We encourage the Legislature to remove the wage cap (and conference/training limitation), expand the threshold to 30 days, and adopt the exclusions in the COST Model legislation for certain types of employees.¹

A Simple Solution: A 30-Day Safe Harbor and Related Employer Withholding Obligations

The COST Board of Directors has adopted a policy position addressing the importance of having a uniform 30-day safe harbor for nonresident workers and their employers.² That policy position provides as follows:

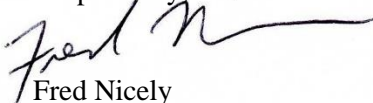
States with individual income taxes should provide a uniform 30-day safe harbor (threshold) before nonresident workers are required to file state income tax returns and their employers are subject to withholding obligations. The current patchwork of state laws governing this area is outdated, burdensome, and inequitably subjects employees and employers to selective tax compliance and enforcement.

A 30-day safe harbor simplifies individual income tax filings and lessens employers' withholding and reporting burdens. It greatly reduces the undue burden that the current system in Nebraska places on employees and employers. This threshold protects nonresident employees traveling into Nebraska for a temporary period from incurring a personal income tax liability in Nebraska and employers (including businesses, associations, governments, and unions) from incurring withholding obligations for those employees. Of course, all of nonresident employee's earnings would be subject to income tax in Nebraska if the employee is present and performing duties for more than 30 days during the calendar year. A 30-day threshold also reduces administrative burdens on the Department of Revenue by eliminating the need to process *de minimis* nonresident tax returns. Finally, the COST Model language includes a reciprocity provision that mitigates the fiscal cost by only applying to nonresidents that are residents of states with a similar provision. Several states have recently enacted or are considering legislation based on the COST Model bill that provides a 30-day safe harbor with a reciprocity provision.³

Conclusion

For the reasons discussed above, COST appreciates L.B. 1023 as a small step in the right direction, but we urge you to consider removing the \$5,000 cap, expanding the threshold, and adopting the exceptions for certain employees in our model. Ultimately, we hope Nebraska will adopt our 30-day threshold model to protect all traveling employees, including emergency workers and first responders; trade union workers; non-profit staff; teachers; federal, state and local government employees; and many others. Please let us know if you have any questions.

Respectfully,



Fred Nicely

cc: COST Board of Directors
Patrick J. Reynolds, COST President & Executive Director

Attachment: COST Model 30-Day Safe harbor legislation.

¹ The COST Model language includes exceptions for certain types of employees, such as professional athletes and professional entertainers. We also encourage the elimination or at least the use of a 30-day threshold before nonresidents are subject to the State's convenience of the employer rule.

² COST's Policy Position on the "Uniform 30-Day Safe Harbor for Nonresident Employees and Related Employer Withholding Obligations" is available at: <https://www.cost.org/globalassets/cost/state-tax-resources/pdf-pages/cost-policy-positions/uniform-30-day-safe-harbor-for-nonresident-employees-policy-statement-final.pdf>.

³Illinois (2019), Indiana (2023), Kansas (Pending), Louisiana (2021), Montana (2023), West Virginia (2021).

Nonresident Withholding and Reporting Threshold Draft Legislation

[Section 1]

(A) As used in this section:

(1) “Professional athlete” means an athlete who performs services in a professional athletic event for compensation.

(2) “Professional entertainer” means a person who performs services in the professional performing arts for compensation on a per-event basis.

(3) “Public figure” means a person of prominence who performs services at discrete events, such as speeches, public appearances, or similar events, for compensation on a per-event basis.

(4) “Qualified Production employee” means a person who performs production services of any nature directly in connection with a state qualified [film, television, or other commercial video production] for compensation, provided that the compensation paid to such person are qualified expenditures under [state’s incentive program], and that such compensation is subject to withholding as a condition to treating the compensation as a qualified production expenditure.¹

(5) “Time and attendance system” means a system through which an employee is required, on a contemporaneous basis, to record the employee’s work location for every day worked outside the state where the employee’s employment duties are primarily performed and which is designed to allow the employer to allocate the employee’s compensation for income tax purposes among all states in which the employee performs employment duties for the employer.

(B)(1) Compensation, as defined under [state statute cross-reference], paid to a nonresident individual is exempt from the tax levied under [state statute cross-reference] if all of the following conditions apply:

(a) The compensation is paid for employment duties performed by the individual in this state for thirty or fewer days in the calendar year;

(b) The individual performed employment duties in more than one state during the calendar year;

(c) The compensation is not paid for employment duties performed by the individual in the individual’s capacity as a professional athlete, professional entertainer, public figure, or qualified production employee; and

(d) The nonresident individual's state of residence: i) provides a substantially similar exclusion, or ii) does not impose an individual income tax, or iii) the individual's income is exempt from taxation by this state under the United States Constitution or federal statute.

¹ A “production employee” exception is optional, based on whether it is needed to avoid undercutting a state’s film, television, or other commercial video production incentive program.

(2) Except as otherwise provided in this division, an employer is not required to withhold taxes under [state statute cross-reference] from compensation that is paid to an employee described in division (B)(1) of this section. If, during the calendar year, the number of days an employee spends performing employment duties in this state exceeds the thirty-day threshold described in division (B)(1)(a) of this section, an employer shall withhold and remit tax to this state for every day in that calendar year, including the first thirty days on which the employee performs employment duties in this state.

(C) The [revenue department] shall not require the payment of any penalties or interest otherwise applicable for failing to deduct and withhold income taxes as required under [state statute cross-reference] if, when determining whether withholding was required, the employer met either of the following conditions:

(1) The employer at its sole discretion maintains a time and attendance system specifically designed to allocate employee wages for income tax purposes among all taxing jurisdictions in which the employee performs employment duties for such employer, and the employer relied on data from that system.

(2) An employer maintaining records under subsection (1) shall not preclude an employer's ability to rely on an employee's determination under subsection (3).

(3) The employer does not maintain a time and attendance system, and the employer relied on the employee's annual determination of the time the employee expected to spend performing employment duties in this state, provided, however, that the employer did not have (a) actual knowledge of fraud on the part of the employee in making the determination and (b) provided that the employer and the employee did not collude to evade taxation in making the determination.

(D) For purposes of this section, an employee shall be considered present and performing employment duties within this state for a day if the employee performs more of the employee's employment duties in this state than in any other state during that day. Any portion of the day during which the employee is in transit shall not be considered in determining the location of an employee's performance of employment duties. However, if an employee performs employment duties in a resident state and in only one nonresident state during one day, such employee shall be considered to have performed more of the employee's employment duties in the nonresident state than in the resident state for such day.

[Section 2]

The enactment by this act of [state code section] applies to taxable years beginning on and after January 1, 202X.

[Section 3]

If any provision of this act, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this act, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.