

# PRECEDENTS TO

# CONGRESSIONAL ACTION

Professor Walter Hellerstein of the University of Georgia Law School noted in *State Taxation* (3<sup>rd</sup> ed.), that federal statutory law already “substantially limits states’ power to tax the compensation of nonresident employees engaged in interstate transportation,”<sup>1</sup> and “this resolution avoids subjecting nonresident interstate transportation employees to the demands of the many jurisdictions in which they are constitutionally taxable and thereby removes what may legitimately be regarded as a burden on interstate commerce.”<sup>2</sup>

Professor Hellerstein cited the following precedents regarding transportation employees as support for his judgment that the 2007 introduction of Mobile Workforce “would constitute an appropriate exercise of congressional power.”<sup>3</sup> The authority of Congress to legislate in the area of nonresident taxation is long established. In fact, a review of Congressional action in this area demonstrates that Mobile Workforce is exactly the kind of remedial action Congress should undertake to provide “a practical resolution of what can be a thorny administrative problem.”<sup>4</sup>

A review of related action shows that Mobile Workforce is exactly the kind of legislation Congress should undertake to provide “a practical resolution” to a “thorny...problem.”

Excluded Employees	Code Section	Date Enacted
Merchant mariner employees	49 U.S.C. 11108	1983 (withholding): 2000 (liability)
Air carrier employees	49 U.S.C. 40116(f)	1994, formerly Sec. 1512
Railroad employees	49 U.S.C. 11502	1995, formerly Sec. 11504
Motor carrier employees	49 U.S.C. 14503	1995, formerly Sec. 11504
Military service members	50 App. U.S.C. 571	2009

## Merchant Mariner Employees

Section 11108 was amended in 2000 in order to prevent merchant mariners from being subject to tax in multiple jurisdictions. Merchant mariners requested Congressional action after the Interstate Commerce Act exempted truck drivers, airline pilots, and railroad employees from being taxed in jurisdictions in which they do not reside.<sup>5</sup> The amendments expanded the previous exemption applicable to withholding only. The current statutory language restricts taxation to the state and political subdivision of residence with respect to compensation of a person who performs regularly assigned duties while engaged as a master, officer, or crewman on a vessel operating on navigable waters in two more states. Notably, there is no “days” threshold; it is a blanket preemption of nonresident state taxation.

## **Railroad Employees**

Section 11502 provides that no part of the compensation paid by a rail carrier providing interstate transportation to an employee who performs regularly assigned duties in more than one state will be subject to state or local tax except in the state and locality of the employee's residence. Withholding information returns and other reports are only due to such state and locality of residence. Protection from income tax withholding for railroad employees was first enacted in 1970.<sup>6</sup> The Multistate Tax Commission (MTC) in 1970 adopted a recommendation for "proposed uniform legislation" that, while including the technical provisions of the federal law, would rely on state, rather than federal, enactment to meet the concerns of interstate carriers.<sup>7</sup> In its report on the measure, the Senate Commerce Committee noted that the MTC "has indicated a strong preference for continuing to make attempts to resolve the interstate income tax problem through their members without federal intervention... The Committee feels that action must be taken on a federal level."<sup>8</sup>

## **Motor Carrier Employees**

Section 14503 provides that no part of the compensation paid by a motor carrier providing interstate transportation or by a motor private carrier who performs regularly assigned duties in two or more states will be subject to the income tax laws of any state or locality, other than the state or locality of the employee's residence. The section also applies to water carrier employee withholding. Protection from income tax withholding for motor carrier employees was first enacted in December 23, 1970.<sup>9</sup>

## **Air Carrier Employees**

Section 40116(f) provides that the pay of an air carrier employee having regularly assigned duties on aircraft in at least two states is subject to the income tax laws of only: 1) the employee's state and locality of residence, and 2) the state and locality in which the employee earns more than 50% of his pay received from the air carrier (notably, the Multistate Tax Commission endorsed this 50% threshold, albeit as part of uniform state legislation).<sup>10</sup> The preemption also applies to compensation paid in connection with such employee's authorized leave or other authorized absence to perform services on behalf of the employee's airline union. Protection from tax withholding for air carrier employees was first enacted in 1970.<sup>11</sup>

Congress has been protecting employees for travel since at least 1970. Mobile Workforce legislation is a natural next step.

## **Military Service Members**

Military personnel and their spouses do not lose or acquire a residence for tax purposes when they are solely in a particular jurisdiction to comply with military orders. Further, compensation of a service member for military service, or income earned by a military spouse, is not deemed to be income for services performed or from sources within a tax jurisdiction if the member or spouse is not a resident or domiciliary of the jurisdiction in which the service member is serving or in which the income is earned.

## Notes & Citations

**1** *State Taxation*, ¶ 20.05[4][c][i] Thomson Reuters 2012.

**2** *State Taxation*, ¶ 20.05[4][c][ii].

**3** See Testimony of Walter Hellerstein, Before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives, Nov. 1, 2007 at <http://judiciary.house.gov/hearings/pdf/Hellerstein071101.pdf>.

**4** *State Taxation*, ¶ 20.05[4][c][ii].

**5** See S. Rep. 106-421, 106th Congress, 2000 WL 1429693 (Leg. Hist.).

**6** Pub. L. 91-569, § 1 (1970), amending the Interstate Commerce Act Dec. 23, 1970; P.L. 91-569

/ H.R. 10634, cited below, also applied to motor carrier employees, water carrier employees, and air carrier employees.

**7** Third Annual Report of the Multistate Tax Commission, for the Fiscal Year of July 1, 1969—June 30, 1970. Notably, a state-based alternative to Mobile Workforce, also endorsed by the Multistate Tax Commission, has only been adopted by one state. The MTC's Third Annual Report also cites fears that the restrictions on taxation of interstate carrier employees could "set a precedent for similar legislation affecting other types of wage earners, including salesmen, athletes and even commuters." Mobile Workforce would indeed protect nonresident traveling employees outside the interstate carrier industries, although it would not apply to regular commuters, athletes, or other nonresidents commonly targeted for wage withholding and payment enforcement.

**8** S. Rep. 91-1261 (1970).

**9** Pub. L. 91-569, § 2, 84 Stat. 1499 (1970) (amending the Interstate Commerce Act).

**10** In fact, then-MTC Executive Director Eugene Corrigan stated that in the event that federal preemption legislation was "inevitable... the great preponderance of our member states prefer [the 50% threshold] approach..." Mr. Corrigan further stated this "alternative is significant... in that it preserves the philosophy that the state in which the preponderance of the compensation is earned has prime authority to require withholding. That philosophy can be important if Congress should ever seek to extend to other employees the applicability of any withholding limitation legislation which it may pass at this time." S. Rep. 91-1261 (1970).

**11** Pub. L. 91-569, § 4 (1970), amending the Federal Aviation Act.