

COMMITTEE DISCUSSION DRAFT #2

UNIFORM WAGE WITHHOLDING PROCEDURE ACT

FOR DISCUSSION PURPOSES ONLY

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM LAWS

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With Reporter's Notes

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UNIFORM WAGE WITHHOLDING PROCEDURE ACT

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1 Withholding³ and has made substantial progress towards the completion of a Harmonized Wage
2 Code for Unemployment Insurance.
3

4 The STAWRS group found that there are 14 most common elements of income which, if
5 adopted by all states for both income tax withholding and unemployment tax and wage base
6 purposes, would lead to substantial harmonization and significant compliance simplification.
7 These 14 elements are the most common elements of compensation paid by most, if not all,
8 employers.
9

10 Eighty-five percent of the 6.7 million employers in the United
11 States employ 20 or fewer workers. It is also known that these
12 ‘small’ employers deal with fewer of the component provisions
13 found in all the state and federal employment tax laws. Thus, most
14 small employers will not be concerned with many of the
15 components, usually those involving more complex forms of
16 remuneration. Therefore, the project team looked at components
17 that are most common among small employers and their
18 employees...”⁴
19

20 For the small employers in particular, most of which do business in a single state, relief
21 from compliance burdens would be realized if there was harmonization of the most common

1 ³The Harmonized Wage Code For Income Tax Withholding (unpublished study, IRS
2 2001)(copy on file at the U. of Dayton School of Law with Prof. Laurence B. Wohl) (hereinafter
3 sometimes referred to as the “HWC/ITW”). This followed the issuance of the Targeted Harmonized
4 Wage Code (unpublished study, IRS 2001)(copy on file at the U. Of Dayton School of Law with
5 Prof. Laurence B. Wohl) (hereinafter sometimes referred to as the “THWC”) which, despite it earlier
6 issuance, is a derivative of the HWC/ITW. Both reports, though unpublished in hardcopy for general
7 distribution were made available on a internet web site maintained by the Internal Revenue Service.
8 In 2001 the IRS consolidated that site with others it maintained, but in the transition to the new site
9 the HWC/ITW and THWC reports were not made available on the new site.
10

11 The HWC/ITW and the THWC reports focus on inter-jurisdictional harmonization of
12 income tax withholding statutes. Two additional reports which are uncompleted and currently on
13 hold, will focus on inter-jurisdictional harmonization of unemployment insurance tax (“HWC/UI”
14 report) and on inter-jurisdictional filing date harmonization (sometimes herein referred to as the
15 “HWC/FD” report). All the reports deal, or will deal, only tangentially with intra-jurisdictional
16 harmonization of income tax withholding and unemployment insurance provisions.

1 ⁴ The Harmonized Wage Code For Income Tax Withholding (unpublished draft study, IRS
2 2000)(copy on file at the U. of Dayton School of Law with Prof. Laurence B. Wohl) (hereinafter
3 sometimes referred to as the “draft HWC/ITW). [footnotes omitted] The report also points out that
4 “...15% of the ‘large’ employers employ more than 50% of all workers in the U.S.” Id. at note 17.

1 elements of compensation because it is with those that they deal almost exclusively. Even for
2 large employers and those doing business in more than one state the harmonization of the most
3 common elements of compensation would provide significant alleviation of compliance
4 complexity. The more the various codes can be harmonized the greater will be taxpayer and
5 governmental relief from compliance complexity.
6

7 On the other hand, despite the obvious value of simplification, each state has its own
8 unique issues with which to deal, and thus complexity reducing policy compromises may not be
9 appropriate with other jurisdictions or within a single state between its income tax withholding
10 needs and its unemployment insurance needs. However, it is not unreasonable to assume that
11 much, if not all, of each state's legislation dealing with income tax withholding and
12 unemployment insurance tax assessment is done without consideration of other jurisdictions or
13 even other statutory schemes within the same state. Consequently, a review by each jurisdiction,
14 with the assistance of this uniform law, may cause the various States to realize they are able to
15 make modifications to their laws which, while making little if any policy compromises, will
16 assist in the cost reducing simplifications of more uniform assessment and collection practices.
17

18 Though it will be impossible to construct a single code that will conform in totality each
19 state's income tax withholding and insurance tax provisions or that will cause the various states'
20 codes to conform to other states', it is quite possible to find sufficient areas of compromise to
21 substantially reduce compliance burdens for states and for employers in general and small
22 employers in particular.
23

24 The fourteen most common elements of wages⁵ are referred to as the Targeted
25 Harmonized Wage Code or THWC. It appears that these elements, if harmonized throughout
26 the income tax codes of all states and federal government would be a good first step in
27 simplifying compliance requirements. These 14 elements have been adopted by this proposed
28 uniform law. Because these fourteen items are the most common forms of remuneration for
29 employees' services a large majority of employers will be directly, and positively, impacted by
30 this conformity. Hopefully, this structure will also simplify the compliance process and
31 administration of reporting for large and intra-state employers by making the number of their
32 wage components effecting the majority of their employees the same for all jurisdictions and
33 both wage bases.
34

35 States may balk at conforming even their own income tax and unemployment tax wage
36 bases let alone conforming those wage bases to other states and, possibly, even the federal
37 income tax withholding and FICA wage bases for a number of good reasons. Two of these

1 ⁵ The fourteen items set out by the IRS to be excluded from the withholding tax wage base
2 are (in no particular order of importance): vacation pay, compensation for jury duty, employer
3 provided meals and lodging, group term life insurance, dependent care benefits, tips, employee
4 business expense reimbursements, health insurance, cafeteria plans, moving expenses, death benefits,
5 sick pay, fringe benefits and contributions to qualified retirement plans.

1 reasons are that conformity will most likely lead to a loss of revenue, and conformity will reduce
2 unemployment benefits in some states.⁶ A report commissioned by the STAWRS project set out
3 the following example in explaining the revenue impact of reducing the unemployment insurance
4 wage base:

5
6 To illustrate the impact on tax revenues, consider the following:

7 An employer has an employee in state A and an employee in state
8 B and each earns \$20,000 per year. State A has a taxable wage
9 base of \$10,000 as opposed to state B's \$21,000. (Taxable wage
10 base is that portion of an employee's total wages subject to SUI tax
11 [and may not be the same as that employee's income tax wage
12 base].) Consider as well that the reduction in taxable wages
13 resulting from these definitional changes is \$1,000 per year. There
14 would be no impact in state A inasmuch as the portion of the
15 employee's taxable wages would be unchanged. However, in state
16 B taxable wages would be reduced from \$20,000 to \$19,000 and
17 there would be a commensurate reduction in tax paid by the
18 employer.

19 When considering worker unemployment benefits, there are two
20 types of impacts that can occur. First, there are minimum earning
21 levels in each state that must be met before an employed worker
22 becomes eligible for benefits. If any reduction in wages would drop
23 a worker's earnings below the minimum earnings level, that
24 worker would no longer be eligible for benefits...

25 Second, and more likely, is the potential reduction in weekly
26 benefit amounts (WBA). These amounts are calculated on a
27 worker's earnings, generally a combination of annual earnings and
28 high-quarter earnings. Any reduction of annual or high-quarter
29 earnings reduces the worker's WBA...⁷

1 ⁶ Anything that reduces the taxable wage base potentially can result in loss of benefit because
2 the base upon which benefits are calculated will be reduced. For example, in California benefits are
3 calculated based upon minimum wage payments during a base period of between \$900 and 1,300
4 depending on certain variable (Cal. Unemp. Ins. Code §1281). Anything that lowers amounts
5 considered as wages under the unemployment insurance regime, therefore, will go to lower, or
6 possibly eliminate benefits.

1 ⁷ Lalith de Silva, Dominic Rotondi, Mikel Lasa, The Impact of the Targeted Harmonized
2 Wage Code on Unemployment Insurance, pg. 10-11, note 7, (unpublished study. Planmatics Inc.
3 2001)(on file at the University of Dayton School of Law with Professor Laurence B. Wohl
4 (hereinafter referred to as the "Planmatics study.") The Planmatics report studied the impact of
5 harmonizing the 14 items in twelve states: California, Connecticut, Georgia, Iowa, Louisiana,
6 Mississippi, Minnesota, Montana, Nevada, New Jersey, Pennsylvania and Texas. Id. at 14.

1 elsewhere and is unrelated to the question of how to collect the tax. Items subject to income tax
2 will continue to be subject to that tax even if the item is not subject to withholding.
3

4 On the other hand, policies underlying unemployment insurance programs are concerned
5 with dispersal of benefits as well as the collection of sufficient revenues to provide for those
6 benefits. For purposes of unemployment insurance, items placed in the wage base are important
7 on two counts. First, an item added to the unemployment insurance wage base makes it easier
8 for an employee to meet the threshold amounts of income needed to qualify for benefits; and,
9 second, an item of income added to the wage base increases benefits payable (up to statutory
10 maximums) to an unemployed former employee. Consequently, putting the issue of complexity
11 momentarily aside, the income tax withholding regime is indifferent as to items in the wage base
12 whereas the unemployment insurance tax regime is deeply concerned about the items in the wage
13 base. For purposes of unemployment insurance each item placed in the wage base and subject to
14 unemployment insurance tax will lead to increased revenues available for distribution to those in
15 need.
16

17 In attempting to harmonize the two separate code constructs there must be a careful
18 balancing of the need for simplicity, and thus compliance cost reduction, with the need not to
19 compromise benefits that a state has deemed appropriate for its unemployed. The Act, if
20 adopted by the States, will create substantial conformity, and thus simplification, between an
21 adopting State's income tax wage base and its unemployment insurance wage base as well as
22 substantial conformity of those wage bases among the States⁹.
23

24 The fifty states, the District of Columbia, and the federal
25 government have a total of 96 different employment tax laws.
26 Within the 96 employment tax laws, there are almost 500 different
27 components or provisions. Employers must maintain separate
28 wage records for federal income tax withholding, state income tax
29 withholding, the federal insurance contributions act (FICA), the
30 federal unemployment tax act (FUTA), and state unemployment
31 insurance (SUI) taxes. *In many cases, employers must report this*
32 *information to government agencies at different times, on different*
33 *forms, and on assorted media. ...*

34 In addition to requiring employers to report tax-and wage-related
35 information, employment tax laws require government agencies to
36 process the information reported, verify that the information
37 complies with the laws, work with employers to correct reports that
38 do not comply, and provide assistance to employers attempting to
39 comply. The diversity in current laws and filing dates makes it
40 difficult for government agencies to provide consistent, accurate,
41 and timely service to their customers.

1 ⁹ There are 43 different federal and state income tax codes and 53 social welfare tax codes.

1 The diverse state and federal laws governing wage taxes and
2 withholding significantly increase employer burden....¹⁰
3

4 Reporting complexities are very costly to everyone. Small employers must attempt to
5 understand sometimes subtle distinctions, have knowledge of a large number of definitions and
6 attempt to understand the different requirements of them for two different codes within their
7 state. Large and small employers that do business in more than one state must deal with these
8 issues in each state and the administrative complexities caused by multi-jurisdictional
9 differences. States must maintain two separate taxpayer auditing capabilities (and staffs) to
10 insure compliance with two separate laws.
11

12 Though it will be impossible to construct a single code that will conform in totality each
13 State's income tax withholding and unemployment insurance tax provisions or that will cause the
14 various States' statutes to conform to the other States' statutes, it is quite possible to find
15 sufficient areas of commonality to substantially reduce compliance burdens for states and for
16 employers in general and small employers in particular. "Eighty-five percent of employers of the
17 6.7 million employers in the United States employ 20 or fewer workers. ... [T]hese 'small'
18 employers deal with fewer of the component provisions found in federal [and state]
19 employment tax laws."¹¹
20

21 The Commissioners believe that the Act creates the proper balance between efficiency
22 and cost savings on the one hand and the necessary flexibility required by each State to meet its
23 citizens' unique needs. The Commissioners recognize that issues of jurisdictional integrity and
24 different needs of the various States could create stumbling blocks to harmonization.
25 Nonetheless, the Commissioners believe that adoption of this Act will lead to significant
26 simplification and cost savings for employers and States.
27
28
29

30 II. DEFINITIONS:

1 ¹⁰ HWC/ITW, *supra*, note 3 at 1-1. (Emphasis Added)

1 ¹¹ HWC/ITW, *supra*, note 3 at 1-7 [footnote omitted]. The note accompanying this
2 statement in the HWC/ITW points out that "15% of the 'large' employers employ more than 50%
3 of all workers in the U.S.", and further, the components of their employees' wages are far more
4 complex than those of small employers. Consequently, harmonization among the states and, ideally
5 the states and the federal government would have a dramatic impact on the compliance complexities
6 faced by all employers but probably a greater impact on the country's largest employers. However,
7 as pointed out in a study conducted by an outside contractor to the STAWRS group, though "small"
8 employers, "[a]s a group... generally deal with a smaller number of wage components ... [they], in
9 the aggregate, bear the greatest per employee costs associated with the payroll reporting process."
10 Planmatics study, *supra*, note 7 at pg. 5.

- 1 A. "Act" means this Uniform Withholding Tax And Unemployment Tax Wage Bases Act.
- 2 B. "Annuity" means a contract providing for an individual's investment in exchange for
3 guaranteed payments from the other contracting party in determinable annual installments
4 for a fixed period of years or until the death of the one receiving payments under the
5 annuity contract.
- 6 C. "Deferred compensation plan" means a plan maintained by an employer whereby the
7 payment of a portion of an employee's compensation for services currently rendered in
8 the capacity of employee is deferred to future taxable years.
- 9 D. "Disability" means the inability of an employee to perform significant employment
10 activity for the employer from which, or on behalf of which, the employee is being
11 provided benefits and/or compensation during the period of such inability to engage in
12 significant employment activity.

13 COMMENT

14 This is a relatively loose definition of disability. However, the Act is dealing primarily with
15 withholding requirements and unemployment wage base issues as they effect employers'
16 payments for forms of compensation. This provision takes the position that if an employee's
17 condition is sufficient to satisfy the employer or the employer's insurer that disability payments
18 should be made that is sufficient evidence that a disability is extant.
19

- 20
- 21 E. "Employee" means every individual performing services for another individual or entity
22 if the relationship between him or her and the person or entity for whom or which he or
23 she performs such services is the legal relationship of employer and employee.

1 COMMENT

2
3 This definition does not address the question of whether an individual relationship is that of
4 employer/employee or customer/independent contractor and leaves the resolution of that
5 characterization to federal and state judicial, regulatory or statutory determination. Generally
6 this is not a major issue, however in those situations when the distinction is both important and
7 unresolved the determination of status is left unaddressed here. The focus of the Act is a
8 determination of which items of wages shall be included for purposes of income tax withholding
9 and unemployment insurance tax and benefits wage base calculation. The Act is not concerned
10 with the issue of characterizing items of income as being or not being wages.
11

12 It should be noted that IRC Section 3401(a)(3) provides that wages "...paid for domestic
13 service in a private home, local college club, or local chapter of a college fraternity or sorority are
14 not considered wages for purposes of the withholding tax requirements. Nonetheless, they are
15 not excluded from wages under???? or state unemployment insurance tax or wage base
16 calculations. *See, e.g.,* Cal. Unemployment Insurance Code Sections 682 - 684.
17
18
19

20 F. "Employee Achievement Award" means a payment by an employer to an employee that
21 meets all the requirements of IRC Sections 74(c) and 274(j)

22 G. "Employer tax deferred compensation plan" means a tax deferred plan qualifying under
23 the provisions of IRC Sections 401, 403, 408(k), 408(p), and 457.

24 H. "Employer" means an individual or entity engaging an individual in the capacity of an
25 employee.

26 I. "FICA" means the Federal Insurance Contributions Act [CITE], commonly referred to
27 as "social security."

28 J. "FUTA" means the Federal Unemployment Tax Act [CITE] under which employers are
29 assessed taxes, in conjunction with state unemployment insurance acts, for purposes of
30 funding state determined unemployment benefits.

31 K. "Gratuity" means a payment by a person other than an individual's employer for services

1 rendered by the individual in the course of his or her employment with his or her
2 employer.

3 L. "IRC" means Title 26 of the United States Code [CITE] (more commonly referred to as
4 the Internal Revenue Code) as in effect on January 1, 2003, and as thereafter from time to
5 time amended.

6 M. "Qualified dependent care program" means a program maintained by an employer for its
7 employees that is in conformance with the requirements of IRC Section 129.

8 N. "Qualified group-term life insurance" means amounts excludeable from an employee's
9 remuneration subject to income taxation under IRC Section 79.

10 O. "Sick pay" means any payment (other than a payment due to disability as defined in this
11 Act) to an employee by an employer, or on behalf of an employer, pursuant to an
12 employer plan whereby the employee receives remuneration in lieu of that which is payed
13 to said employee by the employer for employment services performed and such
14 remuneration is paid by virtue of an employee's absence from work due to temporary
15 sickness or personal injury.

16 P. "State" means each of the 50 states and the District of Columbia.

17 Q. "Tip" means gratuity as defined at section J., above, of this Article II.

18 R. "Wages" means, except as specifically excluded by this Act, all forms of remuneration,
19 whether in cash or in a medium other than cash, paid to an employee by an employer
20 within the context of his or her employment for (1) services rendered for the employer by
21 the employee, and (2) for vacation pay paid by the employer.

1 COMMENT

2
3 Delaware is the only state in which vacation pay is not always an element of wages for
4 purposes of both income tax withholding and unemployment insurance tax assessment and wage
5 base benefit calculation. Delaware excludes as wages vacation pay paid during a period of
6 unemployment
7

8
9 III. EXCLUSIONS

10
11 A. All items set forth in this Article III shall be excluded from wages for the purposes of

- 12 1. determining amounts subject to income tax withholding,
13 2. assessment of the unemployment insurance tax, and
14 3. determining benefits payable by this State for an unemployed individual under this
15 State’s unemployment compensation law

16 B. The following items shall not be deemed wages for the purposes set forth at Section A. of
17 this Article III of this Act.

18 COMMENT

19
20 The reasons harmonization is difficult between a single State’s income tax and
21 unemployment tax provisions is not immediately obvious; but, in fact the tensions between
22 income tax and unemployment tax policies are more difficult to reconcile than intra-State
23 harmonization of either the items subject to income tax withholding or the items composing the
24 unemployment insurance wage base. To understand these tensions policies pursued by the
25 income tax withholding laws and the unemployment insurance laws need to be kept in mind.
26 The purpose of the income tax withholding laws is primarily to establish a procedure by which
27 taxes are to be collected and secondarily assist in the characterization of certain income¹² while
28 the unemployment tax structure is intended to raise revenue from employers for a specific

1 ¹² Though at first blush it might appear that the income tax withholding provisions of a state
2 statute may have something to do with the determination of taxable income by defining factors such
3 as wages and employee, the fact is these definitions are important (from the perspective of income
4 tax) only for determining whether a payer of income is required to withhold income taxes or whether
5 the payee has the responsibility of paying owed taxes directly to the state or federal government.
6 Whether an item of income is wages or some other form of income is irrelevant to the question of
7 whether it is income. That is an issue with which the income tax withholding provisions do not deal.

1 employee benefit, and most importantly, to provide a basis upon which benefits are calculated¹³.
2 For example, whether employer provided meals are income is determined under income tax
3 statutes independent of the withholding requirements. In other words, taxes will be withheld
4 only if it is *a priori* determined that there is a tax to be collected. Unlike income tax withholding,
5 however, the unemployment insurance provisions make two indivisible determinations: (1)
6 whether, as to the item of payment, the relationship between payor and payee is that of employer-
7 employee, and (2) if so, whether the item in question is income¹⁴.

8 For example, an employer's reimbursement to an employee for purchases made by the
9 employee at the direction of and for the sole benefit of the employer would not be income subject
10 to tax under the income tax regime¹⁵ or under the unemployment insurance regime. However, if
11 an employee receives from an employer meals that qualify as exempt from income tax under
12 statutory provisions similar to Internal Revenue Code §119¹⁶, they will be considered income for
13 purposes of establishing the employee's wage base and amount of benefits available under
14 unemployment insurance. Consequently, the value of these meals will be subject to an
15 unemployment insurance tax on the employer and be considered part of the wage base for
16 determining an unemployed individual's unemployment benefits. Not all income for
17 unemployment insurance purposes is income for tax withholding purposes. Any attempt to
18 harmonize the income tax withholding provisions with the unemployment insurance provisions

1 ¹³ The Planmatics study stated: "Unlike revenues the impact ... [of the THWC on
2 unemployment] claimant benefits are not directly linked to the taxable wage base. Rather, they are
3 more closely related to workers' occupations, industries in which they are employed, and their level
4 of earnings." Planmatics study, *supra*, note 7 at pg. iv.

1 ¹⁴ There are many sub-issues hidden in the concepts of "wages" and "employee." The
2 question of whether one is an employee or an independent contractor is critically important for a
3 number of reasons including, for our purposes, the question of whether the employer is liable for an
4 assessment of unemployment insurance or FICA on the amount paid to an individual. The
5 classification of an individual as employee vs. independent contractor is far beyond the scope of this
6 Committee's charge (thank goodness!!) and is one that continues to be only partially resolved, at
7 least at the federal level. Additionally, there are similar classification issues in regard to whether a
8 partner is performing services for the partnership as an employee or as a partner and whether a
9 corporate officer-significant stockholder is an employee for unemployment tax purposes.

10 Also, the question of whether a payment to an employee is a wage or something else is of
11 critical importance. For example, a reimbursement of an expense incurred by an employee on behalf
12 of an employer is clearly not a wage, yet its mis-classification as a wage may result in an additional
13 cost to the employer of a state's assessment of unemployment insurance taxes or premiums.

1 ¹⁵ This rather clumsy language is used here because some State statutes may be similar to
2 the federal tax statute. §62(a)(2)(A) excludes such reimbursements from taxable income though they
3 are included in gross income under §61.

1 within a given state will have to recognize the difficulty of dealing with these two different
2 policy concerns.

3
4 Harmonizing the income tax withholding provisions among the States that impose an income
5 tax is more easily accomplished. Though there are differences among the States as to various
6 definitions, there is already significant similarity between existing statutes making the
7 harmonization process less problematic. However, there is significant variation of filing dates
8 that must be addressed to fully harmonize the requirements of the income tax reporting among
9 the states and, as a matter of fact, harmonize the filing and payment date requirements for income
10 tax withholding and unemployment tax withholding within each state.

- 11
12
13
14 1. Any payment made to, or on behalf of, an employee or his or her beneficiary pursuant
15 to an election by said employee or beneficiary under a plan meeting the requirements
16 of Internal Revenue Code Section 125, or any successor thereto.

17 COMMENT

18
19 This provision provides that benefits otherwise excludable from an employee's gross
20 income and subject to income tax and unemployment insurance tax will not be considered
21 includeable in either the income tax or unemployment insurance wage base merely because of
22 constructive receipt issues. IRC Section 125 permits taxpayers to select from a group of benefits
23 provided by their employer. Individually, these benefits are permitted, under the Internal
24 Revenue Code, to be provided on a tax free basis to an employer's employees. Without the
25 intervention of this code provision, however, the fact that employees have the opportunity to
26 select which tax free benefit, from a variety of offerings, they prefer to have is sufficient to
27 make these otherwise tax free benefits taxable under the doctrine of constructive receipt. It
28 appears that all states currently have extant a similar provision for income tax withholding
29 purposes. However, many states do not exempt items paid under IRC Section 125 plans from tax
30 liability (or benefit calculation) for unemployment insurance purposes. For any state that does not
31 have a provision excluding from either wage base the items contemplated under IRC Section 125
32 it will be incumbent upon that jurisdiction to adopt such a conforming provision. In the absence
33 of such provision in the unemployment insurance arena compensation will be paid.

- 34
35
36
37 2. The value of any meals or lodging furnished to an employee by or on behalf of an
38 employer if at the time of such furnishing such value is excluded from the employee's

1 income pursuant to Internal Revenue Code Section 119, or any successor thereto.

2 COMMENT

3
4 This provision excludes from both the income tax withholdings wage base and the
5 unemployment insurance tax and benefits wage base amounts that are excluded because they are
6 items provided by the employer primarily because the physical location for the performance of
7 services requires the employee to live and/or eat on the business premises. No state that imposes
8 income taxes does not already provide such provision or, at least, a provision similar to IRC
9 Section 119 for income tax withholding purposes. However,

10
11 At present, 23 states treat meals and lodging as wages in their [unemployment
12 insurance] laws and would be affected by this recommendation [to exclude meals
13 and lodging from the compensation wage base]. These states include California
14 (included in this study), New Jersey, New York, and Texas. They represent in
15 excess of 26% of the nation’s work force. In terms of impact on affected claims,
16 analysis of California’s data indicate the average benefit claim over its duration is
17 \$2,433 and the average value of the exclusion of the meals and lodging
18 component on affected claims is \$487, amounting to 20% of the claim of the
19 workers affected. This percentage of reduction, or one close to it, could occur in
20 New Jersey, New York and Texas as well.¹⁷

21
22 The report making the above quoted statement pointed out that in California this reduction
23 represents only “...about 0.2% of the total benefit outlay, it represents almost a 20% reduction for
24 the 7600 affected claimants. Additionally, 660 claimants, or 0.1% of the claimant population
25 would lose their eligibility entirely.”¹⁸ Of course, for those who have remuneration from their
26 employers other than meals and lodging at or in excess of the maximum taxable unemployment
27 insurance wage base the exclusion of the value of meals and lodging is of no consequence.
28
29
30

- 31 3. Payment to, or on behalf of, an employee by the employee’s employer to the extent
32 the employer shall reasonably believe that the payment (or portion thereof) will
33 qualify for deduction under Internal Revenue Code Section 217 (as determined
34 without regard to Internal Revenue Code §67) or exclusion under IRC §132(a)(6).

1 ¹⁷ Planmatics study, *supra*, note 7 at pg. v.

1 ¹⁸ *Id.* at 34.

1 COMMENT

2
3 This provision requires the exclusion from the wage base for purposes of income tax
4 withholding and unemployment insurance tax and wage base calculation amounts paid for what
5 are commonly referred to as moving expenses. All states that impose income taxes already
6 provide such a provision except for two states with no provision. Generally it can be presumed
7 that employer paid or reimbursed moving expenses will be paid only to those whose regular
8 wages already exceed the maximum unemployment insurance wage base. Thus, this provision
9 should have no impact on the benefits payable to any employee receiving unemployment
10 benefits nor any employer's unemployment insurance tax liability even if a state's deductions or
11 exclusions are not as generous as those provided under the Internal Revenue Code.
12

- 13
14
15 4. Premiums paid for qualified group-term life insurance on the life of an employee.
16

17 COMMENT

18
19 There is no state that imposes either an income tax or an unemployment insurance tax that
20 does not have either a provision similar to this provision or has no provision that would subject
21 such premiums to income tax or have implications on their unemployment insurance regime.
22

- 23
24
25 5. Amounts paid an employee by an employer as an Employee Achievement Award.
26

- 27
28 6. The amount of any payment (including any amount paid by an employer for insurance
29 or annuities, or into a fund to provide for any payment) made to, or on behalf of an
30 employee or any of his or her dependents under a plan or system maintained by the
31 employer which makes provision for all or specific classes of the employer's
32 employees, and their dependents, generally or for a class or classes of the employer's
33 employees (or for a class or classes of employees and their dependents), on account
34 of
35 a. sickness

1 (1) if mandated under this state's workers' compensation law, and

2 (2) any payment made not mandated under this state's workers' compensation law
3 after six consecutive months from the commencement of such non-mandated
4 payments.

5 b. accident disability payments received under this state's workers' compensation
6 law,

7 c. medical or hospitalization expenses in connection with accident disability or
8 sickness, or

9 d. death;

10 7. any payment or series of payments by an employer to an employee or any of said
11 employee's dependents which is paid -

12 a. upon or after the termination of an employee's employment relationship with said
13 employer due to

14 (1) death, or

15 (2) retirement for disability, and

16 b. under a plan established by the employer which makes provision for his
17 employees generally, or a class or classes of his employees, (or for such
18 employees or class or classes of employees and their dependents), other than any
19 such payment or series of payments which would have been paid if the
20 employee's employment relationship had not been so terminated.

21 c. by an employer to a survivor or the estate of a former employee after the calendar
22 year in which such employee died provided such payment is not considered

1 income in respect of a decedent in accordance with [cite state law provision].

2 COMMENT

3
4 In general only income from sick pay or wage continuation plans maintained by the employer
5 but not mandated by a state’s workers’ compensation law are included in an employee’s income
6 wage base for purposes of either income tax withholding or unemployment insurance benefit
7 determination or tax assessment . Additionally, amounts paid due to an employee’s death but are
8 considered income in respect of a decedent are not excluded.
9

- 10
11
12 d. Any payment made or incurred or benefit provided by the employer which affords
13 an employee dependent care assistance pursuant to a qualifying dependent care
14 program as set forth at [cite state law] if at the time of such payment or such
15 provision of a benefit it is reasonable to believe that the employee will be able to
16 exclude such payment or benefit from his or her federal and state taxable income.

17 COMMENT

18
19 This provision excludes the value of benefits provided by an employer to an employee under
20 an employer provided dependent care plan providing non-discriminatory access to dependent
21 care for young children who are dependents and dependent adults who are unable to care for
22 themselves due to physical or mental incapacity. It is intended that these individuals be the same
23 as those defined as “qualifying individuals” at IRC Section 21(b)(1). It is further intended that
24 the State statutory provisions will require a written, non-discriminatory plan similar to that under
25 and meeting the requirements of IRC Section 129. Inclusion of this provision will require many
26 states to adopt dependent care provisions not currently extant. Currently, 42 states have
27 concurring statutes and 1 state has no provision (9 states have no income tax). On the
28 unemployment insurance side of the ledger, however, only 15 states’ statutes conform to these
29 requirements, and 35 states have no provisions dealing with this issue. Two states, Alabama and
30 Michigan provide that payments made directly to the care giver or care facility are not wages to
31 the recipient employee while benefits provided through a wage reduction plan are considered
32 wages to the recipient employee (presumably because of some degree of constructive receipt).
33
34
35

- 36 e. Any fringe benefit provided to or for the benefit of an employee or any cash

1 reimbursement for any such benefit paid to an employee if, at the time of
2 provision or reimbursement, it is reasonable to assume that such benefit will be
3 excluded from the employee's taxable income pursuant to [cite state code similar
4 to Internal Revenue Code Section 132].

5 COMMENT

6
7 Of those jurisdictions imposing an income tax forty-two have provisions that provide this
8 treatment for purposes of income tax withholding and one state has no provision. For purposes
9 of unemployment insurance withholding only thirty-three states have provisions similar to this
10 provision. Ten states currently have no or minimally matching provisions.
11

- 12
13
14 f. Any payment that is a reimbursement for expenses incurred on behalf of, or as an
15 allowance provided by an employer, for but not in excess of, those expenditures
16 that meet the requirements of Internal Revenue Code Section 62 and that are not
17 in excess of the lesser allowance or those expenses actually incurred by the
18 employee for such expenditures.

19 COMMENT

20
21 Though the THWC report indicates that all states provide this exclusion for both income tax
22 and unemployment insurance tax purposes, there are numerous states that do not currently
23 comply with the reporting requirements set out in the Internal Revenue Code. If those states
24 should adopt reporting requirements similar to those mandated for federal tax purposes no
25 additional compliance costs would be incurred by employers or employees who are currently
26 complying with the federal requirements.
27

- 28
29
30 g. Any payments made to, or on behalf of, an employee or the employee's
31 beneficiary from or to a plan or plans described in IRC Section 3306(b)(5)(A)

1 through (F).¹⁹

2 COMMENT

3
4 This provision deals with contributions to pension, profit-sharing and similar arrangements
5 that meet the requirements for tax exemption under Internal Revenue Code Sections 501 and
6 401, et. seq. All states provide similar exclusions for both income tax and unemployment
7 insurance tax purposes but the provisions for many states are complex and could be simplified. It
8 should be noted that these amounts are subject to FICA taxes when contributed to such a plan.
9

- 10
11 h. Gratuities, which in the aggregate for an employee do not exceed \$20 during any
12 given month, paid by third parties or by an employer on behalf of third parties, for
13 services performed as part of the employment relationship.

14 COMMENT

15
16 In general all States currently provide that tips or gratuities are wages and that the employer
17 has a duty to withhold and to make unemployment insurance contributions on those wages. This
18 provision assumes that each state has or will have a reporting measure similar to the federal
19 requirement that the employee provide a monthly statement in writing to the employer stating the
20 amount of tips earned during the preceding month. Because services for which tips are a
21 significant form of remuneration are frequently paid for via credit and debit cards the record
22 keeping requirements for both employer and employee are somewhat less burdensome than they
23 may have been when such payments were generally made in cash.
24

- 25
26
27 i. Remuneration earned by an individual engaging in the interstate transportation of
28 goods or people as the result of transitory passage through this state.

29 COMMENT

30
31 This provision makes it unnecessary for an employer of common carrier vehicle drivers to
32 allocate income among states through which a truck, train, bus, airplane or other similar vehicles
33 transporting merchandise or people through a state, so as to be able to withhold taxes from or pay
34 unemployment insurance taxes based on amounts earned simply because of travel through a state.

1 ¹⁹ These are payments from deferred compensation plans that are defined at Section C. of
2 Article II. of the Act.

1 Seventeen States currently have such a provision and the remaining States' statutes are silent on
2 the matter. Nonetheless, those states that have not addressed the issue statutorily appear, to
3 apply this non-withholding and unemployment insurance wage base exclusion.
4

5
6 j. Wages for services performed in a foreign country provided that

7 (1) the foreign country in which the services are performed withholds taxes on the
8 wages paid, and

9 (2) the wages are excluded from United States income pursuant to Internal
10 Revenue Code §911, and

11 (3) the wages are excluded from income under [the statute of the relevant state.]

12 COMMENT
13

14 Forty six states have adopted provisions similar to this provision. In general the exclusion
15 under IRC Section 911 requires that wages be paid (1) for services performed (2) by a citizen of
16 the United States (3) whose tax home is a foreign country and who (4) has been a bona fide
17 resident of foreign countries for an uninterrupted period of at least an entire taxable year or (5) is
18 a US citizen or resident who is present in foreign countries for 330 days within any consecutive
19 12 month period.
20

21 At present no state imposes an income tax on "foreign" wages. If a State did include such
22 income in its taxable base, it would be impossible to enforce a withholding requirement on a
23 foreign corporation that had no presence in the state, but it could enforce withholding
24 requirements on any corporation that is present in the state. Additionally, if a state exercised
25 jurisdiction over a corporation and chose to include this income in the unemployment wage base
26 there would be an impact on an employee's benefit wage base as well as an imposition of
27 unemployment taxes on the employer.
28
29
30

31 k. Periodic and nonperiodic payments from employer tax deferred compensation

32 plans, commercial annuities and Individual Retirement Accounts provided that the
33 payee elects not to have income taxes withheld on such payments.

34 COMMENT

1 This provision applies only to income tax withholding and permits an opt out of withholding.
2 The default is that there will be withholding on these amounts. However, a written election,
3 along with protecting the payor, will require an informed election by the recipient. Because such
4 distributions are currently excluded from the unemployment insurance tax assessments and wage
5 base calculations this provision will have no impact on those state laws.
6
7
8

9 l. Sick pay unless the payee elects, in writing, to have income tax withheld on such
10 payment.

11 m. Scholarship or Fellowship paid to an individual who is a candidate for a degree at
12 an educational organization described at IRC §170(b)(1)(A)(ii) and used by that
13 individual for qualified tuition and related expenses (as such term is defined at
14 IRC §117(b)).

15 COMMENT
16

17 Arizona, California, Indiana, Ohio, Kansas, and Mississippi are the only jurisdictions that
18 have provisions comparable to this one. None of the other States or the District of Columbia
19 have any provision dealing directly with this issue, though discussions with the STAWRS team
20 indicates that most states currently follow the federal rule through a administrative policy.
21

22 The language of this provision is largely the same language of IRC Sections 117(a) and
23 (b). Thus, like the federal law, this provision is intended to exclude from an individual's gross
24 income only those amounts which are used to pay for tuition, fees, books, supplies and
25 equipment required for enrollment at, or to take courses pursuing a degree at, "an educational
26 organization which normally maintains a regular faculty and curriculum and normally has a
27 regularly enrolled body of pupils or students in attendance at the place where its educational
28 activities are regularly carried on..." IRC Section 170(b)(1)(A)(ii).
29

30
31 C. Filing and Payment Dates
32
33
34
35
36

37 1. For purposes of this Section C. the term "Employment Taxes" shall mean, at any

1 given time, the total of income taxes withheld and unemployment insurance taxes
2 incurred by an employer which are held by the employer and not yet paid to the
3 appropriate government entity.

4 2. All Employment Taxes are to be reported quarterly unless the total amount of
5 Employment Taxes owed by the employer shall not exceed \$2,500 for the calendar
6 year in which case the Employment Taxes are to be reported annually.

7 a. All reports of Employment Taxes shall be filed and submitted to (insert state rule)
8 on such forms as are prescribed by said agency.

9 b. All payments of Employment Taxes shall be made in accordance with the
10 schedule set forth at Section C.3. of this Article III of the Act to [insert state
11 agency].

12 COMMENT

13
14 This provision anticipates a rather substantial administrative change in States' physical
15 collection of withholding and unemployment insurance taxes. Currently, these taxes are
16 collected by two separate entities – the income taxing authorities and the entity responsible for
17 administering the unemployment insurance law. As drafted, this section of the Act would require
18 the collection function to be conducted by the same agency or department which would then be
19 responsible for the ministerial act of properly allocating the funds between the State's income
20 taxing authority and the department responsible for enforcing the State's unemployment
21 compensation law.
22

23 Ideally, this same "collection" agency will be able to verify compliance with both the income
24 tax withholding and unemployment insurance tax laws because there will be no divergence
25 between those laws regarding the definition of wages; at least to the extent of the conforming
26 items set out in this Act.
27
28
29

30 3. All Employment Taxes shall be paid according to the following schedule.

31 a. Provided the total Employment Taxes then currently owed by an employer is

1 equal to or less than \$2,500, the Employment Taxes shall be paid to the State no
2 later than January 31 of the year immediately following the end of a calendar year.

3
4 b. Provided the total Employment Taxes then currently owed by an employer is
5 greater than \$2,500 but equal to or less than \$5,000, the Employment Taxes shall
6 be paid to the State on July 30 and January 31 of each year.

7 c. At any time the total of Employment Taxes then currently owed by an employer is
8 greater than \$5,000, but less than \$50,000, the Employment Taxes shall be paid to
9 the State no later than the 15th day of the calendar month immediately following
10 the calendar month in which this \$5,000 threshold amount is attained.

11 d. At any time the total of Employment Taxes then currently owed by an employer is
12 greater than \$50,000 but less than or equal to \$100,000, the Employment Taxes
13 shall be paid to the State no later than the 3rd business day immediately following
14 the last Friday of the semi-weekly period at which this \$50,000 threshold amount
15 is attained.

16 e. At any time the total of Employment Taxes then currently owed by an employer is
17 greater than \$100,000, the Employment Taxes shall be paid to the State no later
18 than three working days following the day this \$100,000, threshold amount is
19 attained.

20 COMMENT

21
22 In general payment thresholds and dates as well as filing dates for both withheld income
23 taxes and unemployment insurance taxes are specified by statute only in general terms. The
24 specifics are left to the various concerned administrative agencies. However, to enhance the

1 possibilities of conformity, this recommended provision is set forth with greater detail than is
2 found in most current state statutes.
3

4 Analysis of the various States' filing requirements and payment thresholds show a wide
5 variety of dates and amounts. In fact, there are approximately 90 different threshold amounts and
6 109 different filing dates among all the 50 States and the District of Columbia. Employers are
7 unlikely to have to deal with more than a few jurisdictions and/or more than a few payment
8 threshold amounts. Consequently, any one multi-state employer will have far fewer than the
9 nearly 200 different filing and payment requirements. Nonetheless, the multitude of dates and
10 amounts with which any one employer may need to comply under the current state of the law is
11 daunting. Further, the burden on small employers doing business in only one or two states can be
12 dramatic because the cost of keeping track of the various filing and payment dates in relation to
13 the size of the employer may be high.
14

15 In any event, ignoring transition problems (which may, in some cases, be insurmountable),
16 common dates for compliance will greatly ease burdens imposed on all employers. Further, the
17 costs of auditing and assuring compliance incurred by the States presumably will be reduced
18 simply because complexity is reduced.
19

20 This provision also does not provide for a look back period as does the IRC and some state
21 withholding statutes. A look back provision permits payors to base their payment thresholds,
22 and thus frequency of payment of taxes, on prior year compensation history. Because the income
23 taxes withheld and the taxes owed for unemployment insurance purposes are based upon current
24 compensation, it does not appear that look back rules are essential to timely and accurate
25 compliance with the payment rules. In an era of instant information and computerized payroll
26 systems, it does not appear that essential data for proper compliance is difficult to aggregate. On
27 the other hand it is recognized that payments based upon current payrolls may cause cash
28 management problems for employers which have significantly fluctuating payrolls. Nonetheless,
29 payments based upon current compensation rather than look back estimates will make it less
30 likely that employers will become in arrears in payments of their Trust Fund obligations (i.e.,
31 their obligations to pay over withholding taxes). For large taxpayers, at least for federal taxes,
32 this is not an issue because regardless of any look back rules at any time an employer has
33 accumulated \$100,000 of payroll taxes they must be paid over to the government by the next
34 business day after such accumulation. For mid-size taxpayers, particularly those with quickly
35 growing business or those the business of which is highly volatile, the problem of temptation to
36 use rather than pay over Trust Fund monies may cause them much difficulty and deprive the
37 government of monies owed.
38