

State Withholding Tax Considerations Post-Mobile Workforce

by Charles C. Kearns and W. Scott Wright



Charles C. Kearns

W. Scott Wright

State and local withholding tax laws are often described as a patchwork, allowing only the most sophisticated and diligent employers to approach full compliance.¹ If enacted, the federal Mobile Workforce State Income Tax Simplification Act² would provide much needed uniformity for employers and ultimately increase compliance for taxing authorities by establishing uniform state-level thresholds for employer withholding for nonresidents and personal income tax filing obligations for nonresidents.³ However, the federal withholding legislation will not resolve all state (or local) withholding tax questions. Thus, employers will continue to struggle with compliance for state and local employment taxes, including wage and non-wage withholding for personal income taxes.

¹Charles C. Kearns, J. Page Scully, and Jonathan A. Feldman, “A Pinch of SALT: Match Point: Tax Obligations of the Mobile Workforce,” *State Tax Notes*, Oct. 4, 2010, p. 57, *Doc 2010-20676*, or *2010 STT 191-5*.

²S. 3485, 112th Cong. (2012); H.R. 1864 112th Cong. (2012).

³*Id.* The mobile workforce act’s 30-day thresholds only apply to state income tax and withholding obligations. Moreover, several of the mobile workforce act’s definitions (for example, “employee,” “employer,” and “wages or other remuneration”) defer to state law.

Although the business community (and many state administrators) remain hopeful that Congress will enact the mobile workforce act and greatly foster state withholding tax compliance, employers will have to analyze their state withholding tax obligations regarding many other benefits or payments such as nonqualified stock options, deferred compensation, separation payments, retirement payments, and other compensation for services such as accrued vacation payments. Employers will continue to evaluate worker classification questions, both at the employee and employer levels, for various state and local employment tax purposes. This A Pinch of SALT highlights these thorny questions that many employers face, and will continue to face, beyond enactment of the mobile workforce act.

Overview of the Mobile Workforce Act

The mobile workforce act would prohibit states — but not local jurisdictions — from imposing personal income tax on a nonresident’s “wages or other remuneration” unless the nonresident “is present and performing employment duties for more than 30 days during the calendar year in which the wages or other remuneration is earned.”⁴ The mobile workforce act also provides that the “wages or other remuneration earned in any calendar year shall not be subject to State income tax withholding and reporting requirements unless the employee is subject to income tax in such State” because the nonresident employee exceeded the 30-day personal income tax threshold established by the mobile workforce act.⁵ Of course, the mobile workforce act does not affect the states’ ability to tax the entire income of residents.⁶ In general, the mobile workforce act adopts operative definitions by incorporating state law.⁷

⁴S. 3485, section 2(a), 112th Cong. (2012).

⁵S. 3485, section 2(b), 112th Cong. (2012).

⁶S. 3485, section 2(a)(1), -(b), 112th Cong. (2012).

⁷See S. 3485, 112th Cong. (2012) section 2(d)(2) (providing “employee” has the same meaning given to it by the State in which the employment duties are performed”); section 2(d)(6) (adopting the federal definition of “employer” in Internal

(Footnote continued on next page.)

Deferred Compensation and Stock Options

The bright-line withholding threshold in the mobile workforce act does not resolve all compliance problems deriving from deferred compensation or nonqualified stock options.⁸ Also, to the extent a state currently may have a bright-line “working days” threshold for withholding threshold, that bright-line threshold typically does not apply to deferred compensation.⁹ Significant lump sum payments such as deferred compensation, the exercise of nonqualified stock options or restricted stock units, and payments related to separation from service are easy targets for state and local withholding tax auditors.¹⁰ Not only do those payments create tax exposure for an employer, but also they are typically made to payees who are often high-profile employees within a company (and who, incidentally, may supervise the employer’s tax department).¹¹

Several states have policies regarding compensation earned, or rights to which the employee becomes entitled, over more than one tax year. California, Connecticut, New York, and Virginia have issued guidance on nonqualified stock options or

deferred compensation.¹² Despite those policies, the mobile workforce act would prohibit a state from imposing a withholding obligation on employers for a nonresidents’ nonqualified stock options or deferred compensation if, during any year that compensation was earned, the nonresident spent less than 30 days in the taxing state *and* assuming that that compensation is “wages or other remuneration” under applicable state law. However, the mobile workforce act does not specify how that compensation earned over the course of multiple years should be allocated or apportioned to the states where the employee performed his employment services.

Indeed, states have adopted a number of different methods for measuring tax owed by nonresidents and the amount to be withheld from income or gain from nonqualified stock options or deferred compensation. For example, New York state has established an allocation method for nonqualified stock options (without an ascertainable value at grant) based on working days within the state during the period from when the employee was granted the options to when the options vested.¹³ Given the breadth of guidance issued by the New York Department of Taxation and Finance and Tax Appeals Tribunal decisions, several states look to New York in absence of their own guidance addressing nonqualified stock options and deferred compensation.¹⁴ The Georgia Department of Revenue adopted a detailed regulation with policies similar to those in New York, including a grant-to-vest allocation method for nonqualified stock options.¹⁵ Conversely, California and Virginia adopted an allocation method for that compensation based on working days from the date of the grant to the date of exercise.¹⁶ Other states will tax that compensation only if the employee or former employee is a resident of the state when the options are exercised. However, if the employee-payee is a resident when the nonqualified stock options are exercised, the entire spread in value is

Revenue Code section 3401(d), unless the state in which the employee’s employment occurs defines “employer” in which case the state definition applies); and section 2(d)(9) (allowing states in which employment duties are performed to limit the definition of “wages or other remuneration”).

⁸See Cara Griffith, “Practice Notes: Executives Beware: States May Look To Equity Compensation for Revenue,” *State Tax Notes*, Mar. 26, 2012, p. 1031, *Doc 2012-5660*, or *2012 STT 58-5* (“the Mobile Workforce State Income Tax Simplification Act of 2011 . . . does not provide guidance on how to handle either equity or non-equity deferred compensation”).

⁹New York Technical Service No. TSB-M-12(5)I, July 5, 2012. (“The 14-day rule does *not* apply to the following types of compensation: . . . Compensation paid in one year that is related to services performed in a prior year. For example, deferred compensation and compensation from nonstatutory stock options.” (emphasis in original))

¹⁰A threshold issue when determining withholding obligations for deferred compensation payments is whether the payments constitute “retirement income” protected by the Source Tax Act, 4 U.S.C. section 114. Under the Source Tax Act, states may not impose personal income tax (or require withholding) on payments to nonresident recipients from certain nonqualified deferred compensation arrangements that are described in IRC section 3121(v)(2)(C), and such payments are part of a series of substantially equal periodic payments made at least annually and for the life expectancy of the recipient or at least 10 years. 4 U.S.C. section 114(b)(1)(D); *see also* New York Ad. Op. No. TSB-A-11(10)I, Nov. 17, 2011.

¹¹Other than the typical reasons for compliance with state and local withholding obligations — audit exposure and avoiding conflicts with high-level payees within a company — employers may need to initiate compliance efforts to increase internal controls and/or comply with government procurement contracts.

¹²*See* discussion below; *see also*, Conn. Agencies Regs. sections 12-711(b)-16 (incentive stock options), -18 (nonqualified stock options), and -19 (nonqualified deferred compensation).

¹³New York Tech. Svc. Memo. No. TSB-M-07(7)I, Oct. 4, 2007; New York Dep’t of Taxation and Finance Pub. No. 50, May 1, 2011.

¹⁴*See, e.g., In the Matter of: Taxpayer*, Rhode Island Division of Taxation, Administrative Decision Docket No. 2010-11, Oct. 28, 2010.

¹⁵Ga. Comp. R. & Regs. 560-7-4-.05 (eff. for tax years on and after Jan. 1, 2011).

¹⁶California Employment Development Department, Information Sheet — Stock Options, Form DE 231SK, Rev. 4 (Jan. 2011) and Franchise Tax Board Stock Option Guidelines, FTB Pub. No. 1004 (Oct. 2007); Virginia Public Document Ruling No. 05-32, Mar. 15, 2005.

subject to tax by the resident state, with a credit for taxes paid to another state.¹⁷

Also of note when evaluating withholding obligations, employers should consider the effect of reciprocity agreements between the jurisdictions in which the employee performed service during the relevant allocation period.¹⁸ Further, employers should also account for unique state rules such as New York's convenience of the employer test and similar tests in Nebraska and Pennsylvania.¹⁹

Separation Payments

Another common form of compensation that is not fully "protected" by the mobile workforce act is payments resulting from an employee's (typically, an executive's) separation from service of the employer, whether voluntary or involuntary. The employer and employee may (or may not) negotiate those separation payments in consideration for release of claims against the employer, noncompetition by the employee, future consulting, or early termination.²⁰

States that have addressed withholding questions associated with separation agreements have typically looked to whether the consideration paid is for past service or future service by the nonresident payee and whether contingencies (if any) have been satisfied.²¹ For example, the Connecticut Department of Revenue Services said:

¹⁷California Employment Development Department, Information Sheet — Stock Options, Form DE 231SK, Rev. 4 (Jan. 2011) and Franchise Tax Board Stock Option Guidelines, FTB Pub. No. 1004 (Oct. 2007).

¹⁸See, e.g., Indiana Info. Bull. IT33, Aug. 1, 2008 (discussing reciprocity agreement with Kentucky, Michigan, Ohio, Pennsylvania, and Wisconsin concerning nonresident withholding, but noting that the agreement does not apply to local option taxes).

¹⁹New York Tech. Svc. Memo. No. TSB-M-06(5)I, May 15, 2006; see also, *In the Matter of Huckaby*, 829 N.E.2d 276 (N.Y. 2005), cf., *In the Matter of Allen*, 794 N.E.2d 18 (N.Y. 2003) (convenience of the employer test does not apply when determining "covered employment" for purposes of unemployment insurance claims); Neb. Admin. R. & Regs. 22-003.01C(1) ("if the nonresident's service is performed without Nebraska for his or her convenience, but the service is directly related to a business, trade, or profession carried on within Nebraska and except for the nonresident's convenience, the service could have been performed within Nebraska, the compensation for such services shall be Nebraska source income"); 61 Pa. Admin. Code section 109.8 ("any allowance claimed for days worked outside of this Commonwealth shall be based upon the performance of services which, of necessity, obligate the employee or casual employee to perform out-of-State duties in the service of his employer or casual employer").

²⁰Payments for "future consulting" will also implicate worker classification issues, discussed below, such as whether or not the separating employee becomes a "consultant" or merely continues his prior employment duties in all or part.

²¹See, e.g., *Petition of Evans*, N.Y. Div. of Tax Appeals Dkt. No. 813539, Apr. 17, 1997 ("burden was on petitioner to prove

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Connecticut adjusted gross income derived from or connected with sources within Connecticut includes income that is received by a nonresident individual from a covenant not to compete, to the extent that such income is attributable to refraining from carrying on a trade, business, profession or occupation in Connecticut.²²

The Virginia Department of Taxation concluded that a taxpayer was entitled to source "severance" payments from his former Virginia employer to his new state of residence.²³ In September 1999 the employer terminated the employee, at which time the employee signed a termination agreement that included a lump sum severance and additional periodic payments to the employee. In December 1999 the employee moved out-of-state. The Virginia employer made the lump sum payment in 1999 and made the periodic payments in 1999 and 2000. The employer withheld Virginia tax from the payments. The employee filed a 2000 nonresident return, claimed the 2000 periodic payments were received out-of-state, and requested a refund. The department concluded that, although the payments were labeled "severance" by the auditor, the 2000 periodic payments "were contingent upon the Taxpayer complying with all terms and conditions set forth in the separation agreement, which included compliance with the non-competition and nonsolicitation agreement."²⁴

In a later Virginia ruling, an employee and employer entered into a separation and general release agreement in December 2006.²⁵ That agreement was amended in April 2007 to include a noncompetition provision (August 2007 to July 2008), but did not specifically state that consideration was paid to the employee as a result of the noncompetition provision. The employee changed domicile in May 2007. The employee filed a 2007 part-year resident return and claimed the separation payments were made out-of-state. The commissioner noted that severance pay is

that the contract claim settled under the Departure Agreement was for providing future services . . . and that the future services were not connected with a business, trade, profession or occupation carried on in New York"; *Matter of Laurino*, Tax Appeals Tribunal, N.Y. Div. of Tax Appeals Dkt. No.807912, May 20, 1993 ("it is necessary to identify the activity upon which the income was secured or earned . . . [and that] in making this determination, the consideration given by petitioner in exchange for the right to the income at issue is the controlling factor"); *Ballard v. Dept. Rev.*, Oregon Tax Court, Magistrate Division, Dkt. No. 3612, Nov. 28, 1994 (below).

²²Conn. Agencies Regs. section 12-711(b)-20(a) (see examples therein).

²³Virginia Dep't of Taxation P.D. Rul. No. 05-36, Mar. 16, 2005.

²⁴*Id.*

²⁵Virginia Dep't of Taxation P.D. Rul. No. 10-37, Apr. 8, 2010.

considered Virginia-source income to a nonresident if paid to a nonresident.²⁶ However, income received by a nonresident from a noncompetition agreement is not income from Virginia sources.²⁷

The question in the 2010 Virginia ruling was what, if any, value should be attributed to the noncompetition provision.²⁸ The employee argued that an equitable allocation would be one-third of the payments attributable to each of the separation, general release, and noncompetition provisions. The commissioner, relying on several federal cases cited in the ruling, found that in order to determine a value of a noncompetition provision, the parties must have mutually intended at the time of the agreement that a portion of the consideration be allocated to the noncompetition provision. The employee did not provide any evidence regarding the value of the noncompetition agreement. Because the severance amount in the original separation agreement was ratified in December 2006, before the amendment to include a noncompetition provision in April 2007, the commissioner concluded that all the 2007 payments were for severance.

A state tax professional should become involved early in negotiating the separation package in order to provide input to the compensation committee in characterizing and structuring the separation payments to meet the goals of the company and perhaps the soon-to-be retiree or former employee.

Accrued Vacation Pay

Because accrued vacation pay may be earned over a period of years and paid in a later year or years, employers and employees face allocation questions similar to those with other forms of deferred payments. A recent ruling by the Oregon Tax Court noted the potential problems involving accrued vacation payments.²⁹ The question before the Oregon Tax Court in *Ballard II* was “whether a lump sum payment, paid to a nonresident taxpayer while working in Oregon, for accrued and unused vacation time earned while working both within Oregon and in other states, is considered Oregon source income subject to tax by the state.”³⁰ The taxpayer was a resident of Washington from 1997 through February 2009. The taxpayer worked for the U.S. Postal Service in Washington state from 1997 to 2006, in Idaho from July 2006 through April 2007, and in Oregon

from April 2007 through January 2009. The taxpayer retired from the USPS as of January 31, 2009. When the taxpayer began working in Oregon, he carried over some 600 hours of vacation time earned while working in other states. During his 22 months in Oregon, the taxpayer earned 208 hours per year in paid vacation leave, for a total of 376 hours in Oregon. On retirement from the USPS, the taxpayer received a lump sum payment for accumulated vacation time equal to 584 hours based on his current rate of pay at the time of retirement. The taxpayer’s 2009 Form W-2 reflected wages of \$29,532.73 including \$25,906.01 for the lump sum payment. The USPS withheld tax on the entire amount of the taxpayer’s W-2 wages.

Similar to other states, Oregon taxes nonresident income “derived from or connected with sources in this state,” including nonresident income from “business, trade, profession or occupation carried on in this state.”³¹ Moreover, the Oregon Department of Revenue specified that compensation for services includes vacation pay.³² The Oregon Tax Court observed that the relevant statutory provisions and department regulations do not make a distinction between vacation days earned in other states and vacation days earned in Oregon.³³ Thus, because the taxpayer spent all his working days in Oregon during the 2009 tax year, the Oregon Tax Court concluded that 100 percent of income received should be sourced entirely to Oregon.

The tax court rejected the taxpayer’s argument that the lump sum payment should be excluded from Oregon-source income because he earned the income wholly outside the state. First, the court said at least some of the carried-over vacation hours were the result of work in Oregon and the taxpayer continued to be eligible to use those hours in Oregon. Therefore, the compensation had some connection to the state. Importantly, the court noted that the lump sum payment was “based on pay rate at time of retirement.”³⁴ Although the taxpayer earned some of the carried-over vacation hours for work performed in other states, the Oregon Tax Court found more persuasive that the taxpayer recognized the income during the tax year at issue and did not exercise his right to that income “until he was working solely in Oregon.”³⁵

The Oregon Tax Court distinguished *Ballard II* from its seminal case, *Ballard v. Dep’t of Revenue (Ballard I)*.³⁶ At issue in the *Ballard I* decision was

²⁶*Id.*, citing Virginia Dep’t of Taxation P.D. Rul. No. 97-123, Mar. 10, 1997.

²⁷*Id.*, citing Virginia Dep’t of Taxation P.D. Rul. No. 02-151, Dec. 10, 2002.

²⁸Virginia Dep’t of Taxation P.D. Rul. No. 10-37, Apr. 8, 2010.

²⁹*Ballard v. Dep’t of Revenue*, Ore. Tax Ct. Dkt. No. TC-MD 110857C, Sept. 19, 2012 (*Ballard II*).

³⁰*Ballard II*, at 3.

³¹O.R.S. section 316.127(1)(a), -(2)(b).

³²O.A.R. section 150-316.127-(A)(3)(c).

³³*Id.*

³⁴*Ballard II*, at 5.

³⁵*Id.*

³⁶Ore. Tax Ct. Dkt. No. 3612 (Nov. 28, 1994) (unrelated to *Ballard II*).

whether a lump sum settlement payment was Oregon source income where the payment was conditioned only on the acceptance of an offer to work in Oregon. In *Ballard I*, the Oregon Tax Court ruled that the lump sum payment was not Oregon-source income because the taxpayer performed no work in the state.³⁷ In that case, the taxpayer was employed in Arkansas until 1985, when he was laid off. Under the labor dispute settlement, the taxpayer was compensated for the two years he was unemployed, conditioned on his acceptance of a job at the Oregon plant. Although the taxpayer accepted the Oregon job, he later established residency in Washington. The settlement compensation reflected the wages the taxpayer would have earned had he worked at the Oregon plant during the two-year period as the result of a breach of a labor agreement, not for services rendered in-state. Although the payment was conditioned on the taxpayer's acceptance of the Oregon job, the court reasoned that acceptance of employment is not the rendering of services. Thus, the Oregon Tax Court ruled that the settlement payment was not Oregon-source income.

Pension and Other Retirement Payments

In efforts to increase compliance and eliminate the tax gap, some jurisdictions have enacted laws to require plan administrators to withhold tax from some pension and retirement payments.³⁸ State withholding tax requirements applicable to retirement plans or retirement accounts create compliance questions for plan administrators that will not be resolved by the mobile workforce act.³⁹ Those unresolved complexities arise not only because of the divergent state withholding requirements applicable to payments reported on a Form 1099-R, but also because the state tax guidance (if any) may not adequately address the wide variety of retirement products that fall within the broad net of these new withholding laws.⁴⁰

³⁷*Id.* at 205.

³⁸At the federal level, net misreporting is greatly reduced for amounts subject to third-party information reporting or third-party withholding. See "Reducing the Federal Tax Gap — A Report in Improving Voluntary Compliance," IRS (Aug. 2007).

³⁹Plan administrators must also determine the applicability of the Source Tax Act, 4 U.S.C. section 114, to the plan or account at issue. *Supra* note 10.

⁴⁰Some states have taken a different path. For example, perhaps because of its proximity to non-personal income tax states Florida and Tennessee, Georgia excludes retirement income from taxable income in the amount of \$35,000 for each taxpayer who is either 62 years of age or older, or who is permanently and totally disabled. O.C.G.A. section 48-7-27(a)(5)(A)(xiii) (effective for tax years on or after Jan. 1, 2012). The retirement income exclusion for filers age 65 or older is capped at \$65,000. *Id.*

Michigan, in particular, has presented challenges to plan administrators and insurance companies because of the phaseout of the retirement income exemption.⁴¹ Effective January 1, 2012, Michigan requires the administrators of pension and retirement benefits to withhold income tax on "pension or annuity payments . . . from an employer pension, annuity, profit-sharing, stock bonus, or other deferred compensation plan as well as from an individual retirement arrangement, an annuity, an endowment, or a life insurance contract issued by a life insurance company" that are "expected to be includable in the recipient's gross income."⁴² According to the Michigan Department of Treasury, pension and retirement benefits subject to withholding include "most payments that are reported on a 1099-R for federal tax purposes [including] defined benefit pensions, IRA distributions and most payments from defined contribution plans."⁴³ Despite the perceived simplicity of Michigan's new withholding requirement under the Department of Treasury's guidelines, the statutory language may be broad enough to encompass nonqualified plans or accounts that may be subject to information reporting on a federal form other than 1099-R. Further, plan administrators will not always have sufficient payee/account holder information to accurately calculate the retirement income exemption for those retirees who remain eligible for that benefit.

The District of Columbia also enacted a withholding requirement applicable to lump sum retirement payments subject to federal withholding.⁴⁴ As of January 1, 2012, the district requires administrators to withhold tax at the highest income tax rate from a lump sum retirement plan or retirement

⁴¹M.C.L. sections 206.703(1); 206.30(9). Pension recipients born before 1946 are not affected by the new law, i.e., benefits from private sources may be deducted up to \$47,309 for single or married filing separate filers and \$94,618 for married filing joint. M.C.L. section 206.30(9)(a). Private pension recipient born between 1946 and 1952 who file single or married filing separate, up to \$20,000 of their pension may be subtracted from Michigan taxable income. M.C.L. section 206.30(9)(b). Joint filers born between 1946 and 1952 may deduct the first \$40,000 of their pension from Michigan taxable income. *Id.* For pension recipients born after 1952, all private and public pension and annuity benefits are fully taxable and may not be deducted from Michigan taxable income. M.C.L. section 206.30(9)(c).

⁴²M.C.L. section 206.703(1).

⁴³Mich. Dep't of Treasury, Withholding for Pension Recipients, Mar. 6, 2012.

⁴⁴D.C. Act 19-0332, Mar. 23, 2012 ("Targeted Retirement Distribution Withholding Temporary Act of 2012"); Fiscal Year 2013 Budget Support Act of 2012, Act 19-385 (D.C.B. 19-743), Laws 2012, approved June 22, 2012, effective after a 30-day congressional review period.

account made to residents of the district.⁴⁵ Interestingly, the requirement to withhold district income taxes from periodic and non-lump-sum retirement plan or retirement account payments was repealed shortly after enactment because of the adverse effect withholding would have had on many retirees. The withholding requirement is now limited to lump sum distributions enumerated in D.C. Code section 47-1812.08(m)(2).⁴⁶

Worker Classification

As noted above, the mobile workforce act will apply only to wages or other remuneration paid to employees by employers. Therefore, employers will continue to be responsible for properly classifying workers and, in some cases, determining which entity is the proper employer for purposes of state and local employment tax compliance.⁴⁷ Misclassification (or misassignment) of workers — and hence failure to properly withhold tax or contribute to unemployment insurance funds — may result in assessment of state or local employment taxes or may affect state unemployment insurance contribution rates.⁴⁸

With the fiscal condition of federal and state treasuries, and especially insolvency of many state unemployment insurance trust funds, worker classification has come under scrutiny by the IRS, state

tax agencies responsible for withholding tax administration, and state labor departments responsible for unemployment insurance administration. At the federal level, the Voluntary Classification Settlement Program (VCSP) has proven to be a popular way for employers to resolve their federal worker classification issues.⁴⁹ Employers participating in the VCSP should also consider resolving their state worker classification questions, either through a formal state-level classification settlement program (if available) or the state's general voluntary compliance/disclosure program.⁵⁰ Diligent resolution of state-level worker classification questions is especially important for VCSP participants in light of the IRS and state information sharing, such as the Questionable Employment Tax Practices program.⁵¹

Conclusion

Once the mobile workforce act is enacted, multi-state employers will continue to be confronted by a number of complex state and local withholding tax issues. With or without a uniform national state withholding threshold, state tax departments within a company should regularly communicate with the human resources and payroll departments concerning the effect state taxes may have on the company's mobile workforce, including tracking employee travel and employee personal income tax return filings. ☆

⁴⁵D.C. Code section 47-1812.08(m); District of Columbia Revenue Notice 2012-02, Feb. 24, 2012. The district's lump sum retirement withholding requirement does not apply to (a) any portion of a lump sum payment that was previously subject to tax; (b) an eligible rollover distribution that is effected as a direct trustee to trustee transfer; or (c) a rollover from an individual retirement account to a traditional or Roth individual retirement account that is effected as a direct trustee to trustee transfer. D.C. Code section 47-1812.08(m)(2). For purposes of this requirement, "Lump sum distribution" means "a payment from a payor to a resident payee of the resident payee's entire account balance, exclusive of any other tax withholding and any administrative charges and fees." D.C. Code section 47-1812.08(m)(3)(A); Dist. of Columbia Revenue Notice 2012-02, Feb. 24, 2012. "Retirement account" or "retirement plan" means: (1) a qualified employee plan; (2) a qualified employee annuity plan; (3) a defined contribution plan; (4) a defined benefit plan; (5) a tax-sheltered annuity plan; (6) an individual retirement account; (7) any combination of the plans and account listed above; or (8) any similarly situated account or plan as defined by the Internal Revenue Code of 1986. D.C. Code section 47-1812.08(m)(3)(B); Dist. of Columbia Revenue Notice 2012-02, Feb. 24, 2012.

⁴⁶See District of Columbia Revenue Notice 2012-02, Feb. 24, 2012.

⁴⁷See, e.g., *McKenzie Fence v. Dep't of Revenue*, Ore. Tax Ct. Dkt. No. TC-MD 110871N (Oct. 9, 2012); *S.G. Borello & Sons, Inc., v. Dep't of Indus. Relations*, 769 P.2d 399 (Cal. 1989); *Hayes v. Elon College*, 29 S.E.2d 137 (N.C. 1944).

⁴⁸See, e.g., O.C.G.A. sections 48-7-126, -127.

Charles C. Kearns is an associate and W. Scott Wright is a partner with Sutherland Asbill & Brennan LLP's State and Local Tax Practice. Sutherland's SALT Practice is composed of more than 25 attorneys who focus on planning and controversy associated with income, franchise, sales and use, and property tax matters, as well as unclaimed property matters. Sutherland's SALT Practice also monitors and comments on state legislative and political efforts.

⁴⁹Martha Kessler, "IRS: Voluntary Classification Settlement Program Nets 698 Applications in 11 Months," BNA Daily Tax Report, 179 DTR G-9, Sept. 17, 2012.

⁵⁰See Minnesota Dep't of Revenue, Worker Classification Voluntary Compliance Initiative, Oct. 17, 2011 (establishing worker classification voluntary compliance program through Dec. 16, 2011); Connecticut Dep't of Revenue Svcs., Worker Misclassification Serious Problem in Connecticut, Nov. 4, 2011 (encouraging participants in the IRS's Voluntary Classification Settlement Program to resolve Connecticut misclassification issues through the general Voluntary Disclosure Program).

⁵¹Internal Revenue Service, Information on the Questionable Employment Tax Practices Memorandum of Understanding, Pub. No. FS-2007-25 (Nov. 2007, Aug. 2012).