



Practical Sales Tax Considerations for Vendors in the Wake of Wayfair (Part I)

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Introduction

By now we're sure you have all heard about the U.S. Supreme Court case *South Dakota v. Wayfair, Inc.* This case reversed over 50 years of precedent and completely changed the way states can administer their sales tax laws with respect to out-of-state vendors. Though the case has engendered a considerable amount of scholarly debate regarding the breadth of its impact, we'll leave those high-minded discussions to other commentators. In this article, we focus on providing practical advice to vendors who are now faced with a changed, and somewhat uncertain, sales tax landscape. We've broken this material into two installments. In this installment, we will briefly review the *Wayfair* case and provide an up-to-date recap of what each state that imposes a general sales tax has done in response to the case. Next month, in the second installment, we'll walk through a few typical hypothetical situations to address practical questions we have received from clients throughout the country.

The Wayfair Case

Though we don't want to spend too much time reviewing the *Wayfair* case in detail or the legal theory underpinning its conclusions (as much fun as this sounds, we won't try to explain the difference between the substantial nexus requirements contained in the Commerce Clause and the Due Process Clause of the U.S. Constitution—there's a little tax lawyer humor for you), we do need to review the broad change in state sales tax enforcement the case initiated. *Wayfair* is generally known as a "nexus" case. Nexus is just a fancy word for "connection." For a state to force an out-of-state vendor to comply with its sales tax law, the out-of-state vendor must have nexus or a connection with the state. In other words, before a state can impose a tax or require a vendor to collect and remit a tax, there must exist some connection between the state and the entity being taxed or being asked to help administer a state tax.

Here's an example of the nexus principle at work. If my business operates exclusively in Florida—all of my customers are in Florida, all of my people (employees, independent contractors, etc.) are in Florida, and all of my property (offices, showrooms, warehouses, trade fixtures, inventory, etc.) are in Florida—then you wouldn't expect that California could send me a letter saying that I have to pay California sales or income tax. My business simply has no connection to California.

But now, let's change the facts slightly. Let's say all of my people and property are still in Florida, but let's say some of my customers are now in California. Customers can review my products (e.g., widgets) on my website and purchase them over the internet. My business then ships the widgets to the customer in California via common carrier (FedEx, UPS, USPS, etc.). Under this scenario, a connection exists between my company and California by virtue of the fact that the business has entered into transactions with California purchasers. Given these slightly changed facts, can California now require my business to comply with its sales tax law?

The answer, prior to the *Wayfair* case, was no. Though a connection exists between my business and California, there wasn't enough of a connection, or it wasn't the right type of connection, in order to justify California imposing its sales tax on my business. That's because prior to *Wayfair*, a business had to be **physically present** in a state before that state could require the out-of-state vendor to collect and remit the state's sales tax. In our scenario, my business is never physically present in California. Rather, my business simply hands the product to a third-party common carrier for delivery to the customer. It is the third-party common carrier that is physically present in California. This "physical presence" requirement provided a bright line test that allowed out-of-state vendors to conduct their affairs in such a way so as to minimize their sales tax compliance burdens. This was particularly useful for small vendors who might not have the apparatus in place to handle the burden of complying with numerous state sales tax laws. It is important to note, however, that if my business had delivered the product in my own trucks to the customer in California, my business would have physical presence in the state and could have a sales tax compliance obligation.

Under *Wayfair*, all of this changed. The *Wayfair* case effectively removed the requirement that a vendor have physical presence with a state before that state can impose its sales tax laws. In this case, South Dakota passed a law that requires out-of-state vendors that are not physically present in the state to collect and remit the state and local sales taxes if they have "economic nexus" in the state. The South Dakota law applies only to out-of-state sellers who "deliver more than \$100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State." The law is based on the theory that if a vendor's economic activity exceeds the stated thresholds, then it has enough of an economic presence in the state such that the state is justified in requiring it to collect and remit the state and local sales taxes. And while the Supreme Court did not explicitly rule the law to be constitutional (it remanded that issue back to the state courts for further adjudication and the litigants in the case recently settled), it did overrule its prior precedent requiring physical presence.

The Wake of Wayfair

Following South Dakota's lead, many states are jumping on the "economic nexus" bandwagon. Of the 46 jurisdictions that impose a general sales tax (45 states and the District of Columbia), 41

have either enacted or proposed a similar economic nexus rule. Below is a chart that summarizes these rules:

State	Economic Nexus Enacted/Proposed?	Rule	Effective Date
Alabama	Enacted	\$250K sales + listed activity	10/1/2018
Alaska	N/A	N/A	N/A
Arizona	None	N/A	N/A
Arkansas	Proposed	\$100K sales or 200 transactions	N/A
California	Enacted	\$100K sales or 200 transactions	4/1/2019
Colorado	Enacted	\$100K sales or 200 transactions	12/1/2018
Connecticut	Enacted	\$250K sales + 200 transactions	12/1/2018
Delaware	N/A	N/A	N/A
D.C.	Proposed	\$100K sales or 200 transactions	1/1/2019
Florida	None	N/A	N/A
Georgia	Enacted	\$250K sales or 200 transactions	1/1/2019

Hawaii	Enacted	\$100K sales or 200 transactions	7/1/2018
Idaho	Enacted	\$10K sales + referral agreement	7/1/2018
Illinois	Enacted	\$100K sales or 200 transactions	10/1/2018
Indiana	Enacted	\$100K sales or 200 transactions	10/1/2018
Iowa	Enacted	\$100K sales or 200 transactions	1/1/2019
Kansas	Proposed	\$100K sales or 200 transactions	N/A
Kentucky	Enacted	\$100K sales or 200 transactions	10/1/2018
Louisiana	Enacted	\$100K sales or 200 transactions	1/1/2019
Maine	Enacted	\$100K sales or 200 transactions	7/1/2018
Maryland	Enacted	\$100K sales or 200 transactions	10/1/2018
Massachusetts	Enacted	\$500K sales + 100 transactions (“cookie nexus”)	10/1/2017

Michigan	Enacted	\$100K sales or 200 transactions	10/1/2018
Minnesota	Enacted	\$100K sales from 10 or more transactions or 100 or more transactions	10/1/2018
Mississippi	Enacted	\$250K sales	9/1/2018
Missouri	None	N/A	N/A
Montana	N/A	N/A	N/A
Nebraska	Enacted	\$100K sales or 200 transactions	1/1/2019
Nevada	Enacted	\$100K sales or 200 transactions	10/1/2018
New Hampshire	Proposed anti-Wayfair bill	Protect NH remote sellers from collecting sales and use tax and remitting it to out-of-state taxing jurisdictions unless the state attorney general's office determines the tax is constitutionally permissible.	N/A
New Jersey	Enacted	\$100K sales or 200 transactions	11/1/2018
New Mexico	Proposed	\$100K sales	N/A
New York	None	N/A	N/A

North Carolina	Enacted	\$100K sales or 200 transactions	11/1/2018
North Dakota	Enacted	\$100K sales or 200 transactions	10/1/2018
Ohio	Enacted	\$500K sales + cookie nexus	1/1/2018
Oklahoma	Enacted	\$10K sales (collect or notice & report)	7/1/2018
Oregon	N/A	N/A	N/A
Pennsylvania	Enacted	\$10K sales (collect or notice & report)	3/1/2018
Rhode Island	Enacted	\$100K sales or 200 transactions	8/17/2017
South Carolina	Enacted	\$100K sales	11/1/2018
South Dakota	Enacted	\$100K sales or 200 transactions	11/1/2018
Tennessee	Enacted, but not enforced	\$500K sales	Pending further notice
Texas	Proposed	\$500K sales	N/A
Utah	Enacted	\$100K sales or 200 transactions	1/1/2019
Vermont	Enacted	\$100K sales or 200 transactions	7/1/2018

Virginia	None	N/A	N/A
Washington	Enacted	\$10K sales (collect or notice & report) or \$100K sales or 200 transactions (collect)	1/1/2018 or 10/1/2018
West Virginia	Enacted	\$100K sales or 200 transactions	1/1/2019
Wisconsin	Enacted	\$100K sales or 200 transactions	10/1/2018
Wyoming	Enacted	\$100K sales or 200 transactions	2/1/2019

As you can see, the vast majority of states are following suit. Indeed, if a state doesn't follow suit, it might be seen as providing a potential competitive advantage to out-of-state vendors (who don't have to charge tax) over in-state vendors (who do). This new rule has also upset some of the states that do not impose a general sales tax. Those states, such as New Hampshire and Montana, do not want their in-state vendors to have to take on the additional compliance burden of having to collect another state's sales tax despite not being physically present there, when they themselves do not impose such a tax. New Hampshire has proposed anti-*Wayfair* legislation, though it failed to pass the New Hampshire House of Representatives.

Conclusion

This brief review of the *Wayfair* case and the state action it has engendered sets the stage for next month's installment: applying these changed rules to everyday situations vendors face throughout the country. So, stay tuned and buckle in. Because the devil is always in the details, unfortunately, it's going to be a bumpy ride.

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