

NEXUS ISSUES FOR BUSINESSES

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OVERVIEW OF PRESENTATION

TOPICS DISCUSSED

1. Nexus and the Activities that Typically Trigger Income, Sales and Employment Tax Compliance Obligations
2. Public Law 86-272
3. Employer Withholding Issues
4. Tricky Problems and Practical Solutions



NEXUS GENERALLY

- This section is designed to answer two basic questions:
 1. When am I subject to a state's tax laws?
 2. Which state gets to tax the income or sales?



NEXUS GENERALLY

- First question: Nexus, what is it?
 - A. Nexus is a fancy word for “connection.” In order for a state to impose its income or sales taxes on an out-of-state business, there must be a requisite level of connection between the state and the business.
 - B. Fundamental requirement of both the Due Process and Commerce Clauses of the U.S. Constitution that there be:
 - “Some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax”
 - 1. *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 777, 112 S. Ct. 2251 (1992)
 - 2. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945) (in-state salesmen triggers Washington unemployment insurance tax levy)

POLLING QUESTION 1

NEXUS IS JUST A FANCY WORD FOR:

1. Due Process
2. Quid Pro Quo
3. Connection
4. What is this, a vocabulary test?!

INCOME TAX NEXUS

➤ Income Taxes

- A. Income tax nexus had been generally considered to be broader than sales tax nexus, but this likely changed with the recent Wayfair case
- B. States are moving to an “Economic Nexus” approach.
- C. Is this Constitutional???
- D. Nexus can create filing obligations across multiple tax-types.



ECONOMIC NEXUS

- Do efforts target customers in state?
- Are intangibles used in state?
- Are financial or other thresholds met?
- Factor presence nexus applied by MTC:
 - Property of \$50,000, or
 - Payroll of \$50,000, or
 - Sales of \$500,000, or
 - 25% of total property, total payroll, or sales
- Tax Haven Legislation



ECONOMIC NEXUS AND FACTOR PRESENCE BUSINESS TAXES

<u>State</u>	<u>Economic Presence</u>
Connecticut	\$500,000 in annual gross receipts
Massachusetts	Presumption that the state corporate excise tax applies if in state sales exceed \$500,000 annually
Washington (B&O)	\$100,000 in annual gross receipts
New York	\$1,000,000 in annual gross receipts
Ohio (CAT)	\$500,000 in annual gross receipts
Michigan	\$350,000 in annual gross receipts
Oregon	\$750,000 in annual gross receipts
Hawaii	\$100,000 in gross receipts or at least 200 transactions
Pennsylvania	\$500,000 threshold as a rebuttable presumption
Texas (franchise tax)	\$500,000 in annual gross receipts

<u>State</u>	<u>Factor Presence</u>
Alabama (beginning 2015)	MTC Factors
California	MTC Factors (adjusted for inflation)
Colorado	MTC Factors
Tennessee	MTC Factors

Note: 28 states and D.C. have adopted market-based sourcing to date

PUBLIC LAW (P.L.) 86-272

- In order to minimize the potential income tax burden of operating in numerous states, the federal government passed Public Law 86-272
 - This law can prevent a state from taxing businesses that operate within the state so long as the business satisfies certain strict requirements.



PUBLIC LAW (P.L.) 86-272

- Public Law 86-272 prevents states from imposing income taxes on businesses whose only activities in the state are restricted to the “mere solicitation” of sales of tangible personal property.
- So the law only applies to:
 1. Net income taxes
 - It does not apply to gross receipts taxes (e.g. Ohio commercial activity tax, Texas margin tax, Washington B&O tax).
 - No application to withholding or other taxes
 - Does not affect an employer’s responsibility to withhold income tax, pay unemployment tax and disability insurance, and cover workers’ compensation. See e.g. VA Public Document 94-192
 2. Sales of tangible personal property
 - Sales of services and digital products are typically not covered
 3. Limited to “mere solicitation” Wisconsin Dept. of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214 (1992)

PUBLIC LAW (P.L.) 86-272

➤ “Mere Solicitation” – Protected Activities

- Soliciting of orders for sales by any type of advertising
- Soliciting of orders by an in-state resident employee or representative of the company, as long as such person uses an entirely non-public "in-home" office
- Carrying samples and promotional materials only for display or distribution without charge
- Setting up display racks and advising customers on the display of the company's products without charge
- Providing automobiles to sales personnel for their use in conducting protected activities
- Passing orders, inquiries and complaints on to the home office
- Solicitation of indirect customers for the company's goods. For example, a manufacturer soliciting retailers to buy the manufacturer's goods from the manufacturer's wholesale customers
- Coordinating shipment or delivery without charge and providing information relating thereto either prior or subsequent to the placement of an order
- Checking of customers' inventories without a charge therefore (for re-order, but not for other purposes such as quality control)
- Maintaining a sample or display room for 14 days or less at a single location during the tax year
- Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel
- Mediating direct customer complaints if the purpose is solely for ingratiating the sales personnel with the customer and facilitating requests for orders
- Owning, leasing, using or maintaining personal property for use in the employee or representative's "in-home" office or automobile that is solely limited to the conducting of protected activities

PUBLIC LAW (P.L.) 86-272

➤ “Mere Solicitation” – Unprotected Activities

- Making repairs or providing maintenance or service to the property sold or to be sold
- Collecting current or delinquent accounts, whether directly, by third parties, assignment or otherwise
- Investigating credit worthiness
- Installation or supervision of installation at or after shipment or delivery
- Conducting training, seminars or lectures for personnel other than personnel involved only in solicitation
- Investigating, handling, or assisting in resolving customer complaints, other than mediating customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer
- Picking up or replacing damaged or returned property
- Hiring, training, or supervising personnel, other than personnel involved only in solicitation
- Using agency stock checks or any other instrument/process by which in-state sales are made by salespeople
- Maintaining a sample or display room in excess of 14 days at a location within the state during the tax year
- Carrying samples for sale, exchange or distribution in any manner for consideration or other value
- Maintaining, by any employee or other representative, an office or place of business of any kind. This does not include an “in-home office” that is located within the residence of the employee or representative that (1) is not publicly attributed to the company, and (2) is used by the employee/representative solely for soliciting and receiving orders from customers that are transmitted outside the state for acceptance or rejection, or for such other activities that are protected under Public Law 86-272.
- Any activity not listed which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.

PUBLIC LAW (P.L.) 86-272

➤ Traps with P.L. 86-272

A. Business can still be subject to minimum taxes or alternative base taxes

1. Ohio Commercial Activities Tax
2. Oregon Commercial Activities Tax
3. Texas Franchise Tax
4. Tennessee Franchise Tax
5. Washington Business & Occupations Tax
6. Kentucky Limited Liability Entity Tax
7. Alabama's "business privilege tax" (min. \$100, max. \$15,000)
8. California \$800 fixed minimum tax
9. Vermont imposes a gross receipts tax on C-corporations
10. Georgia imposes an annual net-worth tax (\$10-\$5,000)
11. Massachusetts imposes an excise base tax
12. New Hampshire imposes a business enterprise tax.
13. New Jersey fixed dollar minimum (\$500 to \$2000)
14. Nevada Commerce Tax
15. North Carolina's "franchise tax"

B. Though these liabilities are small, they can add up if not addressed; especially once the states add penalties and interest.

POLLING QUESTION 2

PUBLIC LAW 86-272 APPLIES TO ALL OF THE FOLLOWING, EXCEPT:

1. Sales of tangible personal property
2. Mere solicitation
3. Sales of services
4. Net income taxes

SALES TAX NEXUS: WAYFAIR

- For many years, Supreme Court jurisprudence recognized a physical presence standard for sales and use tax nexus purposes.
 - People
 - Offices
 - Property

- In *South Dakota v. Wayfair*, the Supreme Court permitted the possibility that economic presence could create sales and use tax nexus.
 - South Dakota Law:
 - \$100K in sales of goods or services to SD or;
 - 200 or more separate transactions.

NEXUS: WHY THE CHANGE?

- In 1992, *when the last nexus case was decided*, less than 2% of Americans had Internet access – today, 89% of Americans have Internet.
- In 1992, mail-order sales in the US totaled \$180 billion.
- In 2017, **e-commerce retail sales alone were about \$453.5 billion!**
- Since the Dept of Commerce first began tracking e-commerce sales, those sales have increased tenfold from 0.8% to 8.9% of total retail sales in the US – percentage is expected to continue increasing.
- In 1992, it was estimated that the states were losing between \$694 million-\$3 billion annually in sales tax revenues as a result of the physical presence rule. It was more recently estimated that the physical presence standard caused the states to lose between \$8-\$33 billion every year.
- ...“the Court could not have envisioned a world where the world’s largest retailer would be a remote seller.”
- The sheer numbers and statistics show how the Internet has changed the dynamics of the national economy – those numbers will continue increasing, while states continue to lose revenue.

NEXUS: THE WAYFAIR CHECKLIST

- The Court provided a checklist of factors present in South Dakota’s law that strongly suggested why it would be constitutional under the new standard:
 - Safe harbor: Exclude “those who transact only limited business” in the state. (South Dakota’s is \$100,000 in sales or 200 transactions.)
 - No retroactive collection.
 - Single state-level administration of all sales taxes in the state.
 - Uniform definitions of products and services (South Dakota is a full member of Streamlined Sales and Use Tax Agreement (SSUTA)).
 - Simplified tax rate structure. (South Dakota requires the same tax base between state and local sales tax, has only three sales tax rates, and limited exemptions from the tax.)
 - Software: access to sales tax administration software provided by the state.
 - Immunity: sellers who use the software are not liable for errors derived from relying on it.
- Would other state laws satisfy these requirements? Some almost certainly would not!

STATE WAYFAIR LAWS

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Alabama	10/1/2018	\$250,000 in-state sales and seller conducts one of the listed activities
Arizona	10/1/2019	\$200,000 in-state sales for 2019, \$150,000 for 2020, and \$100,000 for 2021 and thereafter
Arkansas	7/1/2019	\$100,000 in-state sales or 200 transactions
California	4/1/2019	\$500,000 in-state sales
Colorado	6/1/2019	\$100,000 in-state sales
Connecticut	12/1/2018 7/1/2019 for \$100K	\$250,000 in-state sales and 200 transactions until 6/30/2019 \$100,000 in-state sales and 200 transactions as of 7/1/2019
District of Columbia	1/1/2019	\$100,000 in-state sales or 200 transactions
Florida	Proposed	\$100,000 in-state sales or 200 transactions
Georgia	1/1/2019 1/1/2020 for \$100K	\$250,000 in-state sales or 200 transactions until 12/31/2019 \$100,000 in-state sales and 200 transactions as of 1/1/2020
Hawaii	7/1/2018	\$100,000 in-state sales or 200 transactions
Idaho	7/1/2018 for referrals 6/1/2019 for \$100k	\$10,000 in-state sales (result of referrals) \$100,000 in-state sales
Illinois	10/1/2018	\$100,000 in-state sales or 200 transactions
Indiana	10/1/2018	\$100,000 in-state sales or 200 transactions
Iowa	1/1/2019 7/1/2019 for just \$100K	\$100,000 in-state sales or 200 transactions until 6/30/2019 \$100,000 in-state sales as of 7/1/2019
Kansas	10/1/2019	No threshold
Kentucky	10/1/2018	\$100,000 in-state sales or 200 transactions
Louisiana	7/1/2019 Enforced: no later than 7/1/2020	\$100,000 in-state sales or 200 transactions

STATE WAYFAIR LAWS (CON'D)

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Maine	7/1/2018	\$100,000 in-state sales or 200 transactions
Maryland	10/1/2018	\$100,000 in-state sales or 200 transactions
Massachusetts	10/1/2017	\$500,000 in-state sales and 100 transactions until 9/30/2019
	10/1/2019 for \$100K	\$100,000 in-state sales as of 10/1/2019
Michigan	10/1/2018	\$100,000 in-state sales or 200 transactions
Minnesota	10/1/2018	10 or more retail sales totaling more than \$100,000 or 100 transactions until 9/30/2019
	10/1/2019 for \$100K	\$100,000 in-state sales or 200 transactions as of 10/1/2019
Mississippi	9/1/2018	\$250,000 in-state sales
Missouri	Proposed	\$100,000 in-state sales or 200 transactions
Nebraska	1/1/2019	\$100,000 in-state sales or 200 transactions
Nevada	10/1/2018	\$100,000 in-state sales or 200 transactions
New Jersey	11/1/2018	\$100,000 in-state sales or 200 transactions
New Mexico	7/1/2019	\$100,000 in-state sales
New York	6/21/2018	\$500,000 in-state sales and 100 transactions
North Carolina	11/1/2018	\$100,000 in-state sales or 200 transactions
North Dakota	10/1/2018	\$100,000 in-state sales or 200 transactions until 12/31/2018
	1/1/2019 for \$100K	\$100,000 in-state sales as of 1/1/2019
Ohio	1/1/2018	\$500,000 in-state sales and uses in-state software to promote sales, or \$500,000 in-state sales and enters into an agreement to provide content distribution to enhance delivery until 7/31/2019
	8/1/2019 for \$100K	\$100,000 in-state sales or 200 transactions as of 8/1/2019
Oklahoma	7/1/2018	\$10,000 in-state sales (register or report) until 10/31/2019
	11/1/2019 for \$100K	\$100,000 in-state sales (register and collect) can no longer provide notice and report as of 11/1/2019

STATE WAYFAIR LAWS (CON'D)

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Pennsylvania	4/1/2018 for \$10k 7/1/2019 for \$100k	\$10,000 in-state sales (register or report) until 6/30/2019 \$100,000 in-state sales (register and collect) can no longer provide notice and report as of 7/1/2019
Rhode Island	8/17/2017	\$100,000 in-state sales or 200 transactions and can no longer provide notice and report as of 7/1/2019
South Carolina	11/1/2018	\$100,000 in-state sales
South Dakota	11/1/2018	\$100,000 in-state sales or 200 transactions
Tennessee	7/1/2019	\$500,000 in-state sales
Texas	1/1/2019 Enforced: 10/1/2019	\$500,000 in-state sales
Utah	1/1/2019	\$100,000 in-state sales or 200 transactions
Vermont	7/1/2018	\$100,000 in-state sales or 200 transactions
Virginia	7/1/2019	\$100,000 in-state sales or 200 transactions
Washington	10/1/2018 3/14/2019 for \$100K	\$100,000 in-state sales or 200 transactions until 3/13/2019 \$100,000 in-state sales as of 3/14/2019
West Virginia	1/1/2019	\$100,000 in-state sales or 200 transactions
Wisconsin	10/1/2018	\$100,000 in-state sales or 200 transactions
Wyoming	2/1/2019	\$100,000 in-state sales or 200 transactions

IS PHYSICAL PRESENCE DEAD?

- NO!!!!
- Economic presence only enters the analysis when the vendor has no physical presence in a state.
- For example, if a business has a salesperson who regularly enters state X, that business will have nexus in state X even if its sales are below state X's thresholds (e.g., sales into the state amount to only \$30K)

PRACTICAL WAYFAIR CONSIDERATIONS

- Despite the fact that many states have passed or are in the process of passing Wayfair-like legislation, many questions persist regarding how the laws will be implemented. For example:
 1. Is it tax on the first dollar you earn in state or does tax start on the first dollar over the threshold?
 2. How long does this economic nexus last?
 3. Is it an annual test? By calendar? Fiscal year? Sliding Scale?
 4. What about wholesale transactions?
 5. Do these laws apply equally to sales of goods and services?

STATE WAYFAIR THRESHOLDS DEFINED

<u>State</u>	<u>Sales Measured</u>	<u>Transactions Measured</u>
Alabama	Retail sales of tangible personal property, including taxable and non-taxable sales, but excluding wholesale sales, sales for resale, and sales made through a marketplace facilitator that is collecting tax on behalf of the seller.	N/A
Arizona	Gross proceeds of sales or gross income, including gross receipts from the sale of tangible personal property or service, or both, excluding sales made through a marketplace facilitator.	N/A
Arkansas	Sale of tangible personal property, taxable services, a digital code, or specified digital products for delivery into Arkansas, excluding tax exempt goods and services and sales made through a marketplace facilitator.	Not defined, but excluding sales made through a marketplace facilitator.
California	Sales of tangible personal property in the state or for delivery in the state, including by sales by affiliates/ subsidiaries and nontaxable sales such as sale for resale, as well as sales made through a marketplace facilitator.	N/A
Colorado	Sales of tangible personal property, commodities or services in the state, excluding sales made through a marketplace facilitator.	N/A
Connecticut	Sales price from retail sales of tangible personal property and taxable services, including sales made through a marketplace facilitator	Not defined, but including sales made through a marketplace facilitator
District of Columbia	Gross receipts from retail sales of tangible personal property, taxable services and digital goods, including sales made through a marketplace facilitator.	The sale in any quantity or quantities of any tangible personal property or service.
Florida	Proposed: Retail sales of tangible personal property.	Not defined
Georgia	Gross revenue from retail sales of tangible personal products delivered into the state electronically or physically, excluding sales for resale.	Not defined
Hawaii	Gross income or gross proceeds from sale of tangible personal property in the state, services used or consumed in the State, or intangible property used in the State. If a marketplace seller and the marketplace facilitator have economic nexus, then it is the gross income or gross proceeds from: sales of tangible personal property made directly into the State (not through a marketplace facilitator); sales of tangible personal property made through any marketplace facilitator if the marketplace seller sends the property into the State, either directly to the purchaser or to a marketplace facilitator for resale; and sales of intangible property and services that were made into the State, regardless of whether the sale was made through a marketplace facilitator, if the intangible property or services are ultimately used or consumed in the State.	Not defined

STATE WAYFAIR THRESHOLDS DEFINED (CON'D)

State	<u>Sales Measured</u>	<u>Transactions Measured</u>
Idaho	\$10,000 -Total sales to Idaho buyers through referral agreements. \$100,000 - Cumulative gross receipts from sales of tangible personal property delivered into Idaho.	N/A
Illinois	Sales of tangible personal property in the state, including exempt sales, but excluding sales for resale, occasional sales, sales not subject to Retailers' Occupation Tax, and sales of tangible personal property that is required to be registered with an agency of the state that are made from locations outside Illinois to Illinois purchasers. As of 1/1/2021 it will not include sales made through a marketplace facilitator.	Transactions that are documented on separate invoices, regardless of the manner in which the tangible personal property is delivered to the purchaser. As of 1/1/2021 it will not include sales made through a marketplace facilitator.
Indiana	Gross revenue from any combination of: the sale of tangible personal property delivered into Indiana; a product transferred electronically into Indiana; or a service delivered in Indiana. Except where the marketplace facilitator has not met the thresholds, the sales of the seller made through the marketplace are not counted toward the seller.	Not defined but where the marketplace facilitator has not met the thresholds, the transactions of the seller made through the marketplace are counted toward the seller.
Iowa	All retail sales of tangible personal property, services, or specified digital products sold into Iowa or for delivery into Iowa, including taxable and exempt sales and sales made by a remote seller by any means, including sales made through a marketplace.	N/A
Kansas	N/A	N/A
Kentucky	Gross receipts derived from the sale of tangible personal property or digital property delivered or transferred electronically to a purchaser in the state, including sales made through a marketplace facilitator.	Not defined, but including sales made through a marketplace facilitator.
Louisiana	Gross revenue of sales of tangible personal property, products transferred electronically, or services delivered into the state, including exempt sales.	Not defined
Maine	Gross revenue from sales of tangible personal property or taxable services delivered in or into the state, including sales exempt from tax.	Each invoice generated from a Maine sale is considered a separate transaction.
Maryland	Gross revenue from the sale of tangible personal property or taxable services delivered in the state, including tax-exempt transactions and Maryland tax-exempt revenue, e.g. sales for resale, sales to tax exempt entities, and sales of exempt items, as well as sales made through a marketplace facilitator.	Not defined, but including sales made through a marketplace facilitator.

STATE WAYFAIR THRESHOLDS DEFINED (CON'D)

<u>State</u>	<u>Sales Measured</u>	<u>Transactions Measured</u>
Massachusetts	Cookie: Transactions completed over the Internet and made sales resulting in a delivery into Massachusetts. 100k or 200: Gross revenue from all sales of tangible personal property or services delivered into the state, including sales exempt from tax, but excluding sales made through a marketplace facilitator. Sales of tangible personal products or services, including taxable and non-taxable and exempt, as well as sales made through a marketplace facilitator.	Not defined, but including sales made through a marketplace facilitator.
Michigan		N/A
Minnesota	Retail taxable and non-taxable sales of tangible personal property and services, including exempt sales and sales made through any marketplace, the seller's own website, and through other sources, but excluding sales for resale. Sales into the state, including wholesales and those taxable under sales and use statutes.	Not defined, but including sales made through a marketplace facilitator
Mississippi		A retail sale is one sales transaction. One sale into the state may contain 10 items for one customer but that transaction counts as one retail sale.
Missouri	SB 50 - gross revenue from delivery of tangible personal property into the state HB 701 - gross receipts from the sale of tangible personal property SB 805 - cumulative gross receipts from the vendor's sales of tangible personal property to purchasers for the purpose of storage, use, or consumption in this state	N/A
Nebraska	Total retail sales of property, excluding sales from resale, sublease, or subrent, but including sales made through a marketplace facilitator	Not defined
Nevada	Gross revenue from retail sale of tangible personal property.	Not defined
New Jersey	Gross revenue from sales of tangible personal property, specified digital products, or taxable services, including nontaxable retail sales and sales made through a marketplace facilitator, but excluding sales for resale.	Not defined, but including sales made through a marketplace facilitator.
New Mexico	Taxable gross receipts from sales, leases and licenses of tangible personal property, sales of licenses and sales of services and licenses for use of real property sourced to the state.	N/A
New York	The amount received for all sales of tangible personal property delivered into New York, whether taxable or exempt, without any deductions for expenses, and including sales made through a marketplace facilitator.	Each invoice, sales slip, contract, or other memorandum of sale issued for the sale of tangible personal property delivered into New York State, whether taxable or exempt, including sales for resale and sales made through a marketplace facilitator.

STATE WAYFAIR THRESHOLDS DEFINED (CON'D)

<u>State</u>	<u>Sales Measured</u>	<u>Transactions Measured</u>
North Carolina	Total of the sales price of all sales of tangible personal property, digital property, and services sourced to NC including taxable sales, sales for resale, exempt sales, nontaxable sales, and marketplace-facilitated sales.	Not defined but including sales made through a marketplace facilitator.
North Dakota	Gross sales of tangible personal property and other taxable items delivered in the state.	N/A
Ohio	Gross receipts from the sale of tangible personal property for storage, use, or consumption in this state or from providing services the benefit of which is realized in this state.	Not defined
Oklahoma	Aggregate sales of tangible personal property, excluding sales made through a marketplace facilitator where the marketplace facilitator collects the tax.	N/A
Pennsylvania	All sales, leases and deliveries of tangible personal property, and sales of services, excluding sales made through a marketplace facilitator who collects tax on its behalf.	N/A
Rhode Island	Gross revenue from the sale of tangible personal property, prewritten computer software delivered electronically or by load and leave, vendor- hosted prewritten computer software, and/or taxable services.	Not defined
South Carolina	Total gross revenue from all sales of tangible personal property delivered into South Carolina, including all taxable retail sales, exempt retail sales, and wholesale sales of tangible personal property; the total gross revenue from all sales of products transferred electronically and services delivered into South Carolina, whether or not the transfer of such product is subject to the South Carolina sales and use tax, including sales made through a marketplace facilitator	N/A
South Dakota	Gross revenue from the sale, rental or lease of tangible personal property, any product transferred electronically, or services delivered into the state.	Not defined
Tennessee	Gross retail sales of products and services, including taxable and exempt sales, but excluding sales for resale.	N/A
Texas	Gross revenue from the sale of tangible personal property and services for storage, use, or other consumption in this state, including taxable, nontaxable, sales for resale and exempt sales, but excluding sales through a marketplace facilitator if it collected the tax.	N/A
Utah	Gross revenue from the sale of tangible personal property, any product transferred electronically, or services for storage, use, or consumption in the state	Not defined

STATE WAYFAIR THRESHOLDS DEFINED (CON'D)

State	Sales Measured	Transactions Measured
Vermont	All sales of tangible personal property products transferred electronically into the state including taxable and nontaxable sales and sales made through a marketplace facilitator.	A sale transaction that is documented on a unique invoice, regardless of the manner in which the tangible personal property is delivered to the purchaser, and includes sales made through a marketplace facilitator
Virginia	Gross revenue from retail sales of taxable tangible personal property or taxable services in the state, excluding sales made through a marketplace facilitator, but sales made by commonly controlled persons shall be aggregated.	Not defined but excludes sales made through a marketplace facilitator
Washington	Cumulative gross receipts of all gross income sourced to the state, including exempt sales and sales made through a marketplace facilitator.	N/A
West Virginia	Gross revenue from sale or lease of tangible personal property, custom software or a taxable service, including both taxable and non-taxable transactions.	Total transactions with West Virginia destinations regardless of whether the transaction is subject to or exempt from sales and use tax.
Wisconsin	Gross sales including taxable and nontaxable sales of tangible personal property and services, including sales made through a marketplace facilitator	Each invoice is considered a "separate sale transaction", and includes taxable and nontaxable sales, and those made through a marketplace facilitator. An invoice that has multiple products is considered one separate sale transaction. For leases and licenses, each required periodic payment is a separate sale transaction. A deposit made in advance of a sale is not a sale transaction.
Wyoming	Gross sales, which includes the total revenue in Wyoming including taxable, exempt and wholesale sales,	Each invoice is a transaction. If the sale involves a yearly subscription and the purchaser is able to make payments over time, this is one transaction.

STATE WAYFAIR MEASUREMENT PERIOD

<u>State</u>	<u>The Measurement Period</u>
Alabama	Previous calendar year
Arizona	Previous or current calendar year
Arkansas	Previous or current calendar year
California	Previous or current calendar year
Colorado	Previous or current calendar year
Connecticut	The twelve-month period ended on the September thirtieth immediately preceding the monthly or quarterly period with respect to which such person's liability for tax
District of Columbia	Previous or current calendar year
Florida	Proposed: Previous calendar year
Georgia	Previous or current calendar year
Hawaii	Current or immediately preceding calendar year
Idaho	Immediately preceding 12 months
Illinois	Determined on a quarterly basis, ending on the last day of March, June, September, and December, whether either threshold was met in the preceding 12-month period.
Indiana	Previous or current calendar year
Iowa	Immediately preceding or current calendar year
Kansas	N/A
Kentucky	Previous or current calendar year
Louisiana	Previous or current calendar year
Maine	Previous or current calendar year
Maryland	Previous or current calendar year

STATE WAYFAIR MEASUREMENT PERIOD

<u>State</u>	<u>The Measurement Period</u>
Massachusetts	100K: For the period beginning October 1, 2019 through December 31, 2019, the preceding 12 months, October 1, 2018 to September 30, 2019. For 2020 onward, the preceding calendar year but if the remote retailer passed \$100,000 in sales after November 1 of the prior year, the requirement is for the period beginning as of the first day of the first month beginning two months after the month in which the \$100,000 threshold is exceeded. Cookie: After 2018, the preceding calendar year. For the period beginning October 1, 2017 through December 31, 2017, during the preceding 12 months, October 1, 2016 to September 30, 2017.
Michigan	Previous calendar year
Minnesota	Prior 12 month period, calculated as of August 2017
Mississippi	Prior 12 month period
Missouri	SB 50 – previous or current calendar year HB 701: Preceding calendar year SB 805 – any 12 month period, following the close of the quarter
Nebraska	Previous or current calendar year
Nevada	Previous or current calendar year
New Jersey	Current or prior calendar year
New Mexico	Previous calendar year
New York	Immediately preceding four sales tax quarters - The sales tax quarters are: March 1 through May 31, June 1 through August 31, September 1 through November 30, and December 1 through February 28/29
North Carolina	Previous or current calendar year
North Dakota	Previous or current calendar year
Ohio	Previous or current calendar year
Oklahoma	Preceding calendar year

STATE WAYFAIR MEASUREMENT PERIOD

<u>State</u>	<u>The Measurement Period</u>
Pennsylvania	Preceding calendar year
Rhode Island	Preceding calendar year
South Carolina	Prior or current calendar year
South Dakota	Prior or current calendar year
Tennessee	Prior 12 month period
Texas	Preceding 12 calendar months. Initial period will be 7/1/2018 -6/30/2019
Utah	Prior or current calendar year
Vermont	Any 12-month period preceding the monthly period with respect to which that person's liability for tax under this chapter is determined
Virginia	Prior or current calendar year
Washington	Prior or current calendar year
West Virginia	Prior or current calendar year.
Wisconsin	Previous or current calendar year
Wyoming	Prior or current calendar year

FEDERAL LEGISLATION

Bills in Congress

1. Stop Taxing Our Potential Act of 2019

(S 128) 1/15/2019

- This bill prohibits a state from imposing on a person obligations related to collecting or paying a sales tax, use tax, or similar tax unless the person had a physical presence in the state during the calendar quarter with respect to which the obligation is imposed.
- This bill was previously introduced as Stop Taxing Our Potential Act of 2018 as S3180.

2. Protecting Businesses from Burdensome Compliance Cost Act of 2019

(HR 379) 1/9/2019

- This bill would prevent states from collecting sales and use tax if there is no physical presence.
- This bill was previously introduced as Protecting Businesses from Burdensome Compliance Cost Act of 2018 as HR 6724 on 9/6/2018.

3. Online Sales Simplicity and Small Business Relief Act of 2019

(HR 1933) 3/27/2019

- This bill would prohibit states from imposing retroactive laws related to the collection of sales tax, prevent states from imposing sales tax collection duties until January 1, 2019, and create an exemption for small businesses that sell less than \$10 million in online sales.
- This bill was previously introduced as the Online Sales Simplicity and Small Business Relief Act of 2018 as HR 6824 on 9/13/2018. A similar bill was also introduced in the Senate as Senate as S 3725 on 12/6/18.

4. No Retroactive Online Taxation Act of 2018

(HR 7184) 11/28/2018

- This bill would prohibited states from retroactively imposing sales tax collection obligations on remote sellers for any sale that occurred before June 21, 2018.

SALES TAX NEXUS: MARKETPLACE VENDORS

- **MARKETPLACE VENDOR NEXUS:**
 - Marketplace vendor nexus legislation would obligate the listing company (i.e., marketplace) to collect sales tax on transactions it facilitates.
 - Various requirements and definitions for marketplace vendors.
 - No uniformity among the states – once again, you just have to know the rules in the jurisdictions that matter

STATE-BY-STATE MARKETPLACE FACILITATOR

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Alabama	Yes	1/1/2019	\$250,000 in-state sales (register or report)
Arizona	Yes	10/1/2019	\$100,000 in-state sales
Arkansas	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
California	Yes	10/1/2019	\$500,000 in state sales
Colorado	Yes	10/1/2019	\$100,000 in-state sales
Connecticut	Yes	12/1/2018	\$250,000 in-state sales
District of Columbia	Yes	4/1/2019	\$100,000 in-state sales or 200 transactions
Florida	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Georgia	Yes	4/1/2020	\$100,000 in-state sales
Hawaii	Yes	1/1/2020	\$100,000 in-state sales or 200 transactions
Idaho	Yes	6/1/2019	\$100,000 in-state sales
Illinois	Yes	1/1/2020	\$100,000 in-state sales or 200 transactions
Indiana	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Iowa	Yes	1/1/2019 7/1/2019 for \$100K	\$100,000 in-state sales or 200 transaction until 6/30/2019 \$100,000 in-state sales as of 7/1/2019
Kansas	Unclear	8/1/2019	"A person who is a marketplace facilitator should contact the Department concerning entering into a voluntary compliance agreement with the Department."
Kentucky	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Louisiana	No		
Maine	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions

STATE-BY-STATE MARKETPLACE FACILITATOR

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Maryland	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions
Massachusetts	Yes	10/1/2017	\$500,000 in-state sales and 100 transactions until 9/30/2019
		10/1/2019 for \$100K	\$100,000 in-state sales as of 10/1/2019
Michigan	Yes	1/1/2020	\$100,000 in-state sales or 200 transactions
Minnesota	Yes	10/1/2018	\$100,000 in-state sales or 200 transactions
Mississippi	No		
Missouri	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Nebraska	Yes	4/1/2019	\$100,000 in-state sales or 200 transactions
Nevada	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions
New Jersey	Yes	11/1/2018	None specifically, but \$100,000 in-state sales or 200 transactions generally applicable
New Mexico	Yes	7/1/2019	\$100,000 in-state sales
New York	Yes	6/1/2019	\$500,000 in-state sales or 100 transactions
North Carolina	Yes	2/1/2020	\$100,000 in-state sales or 200 transactions
North Dakota	Yes	10/1/2019	\$100,000 in-state sales

STATE-BY-STATE MARKETPLACE FACILITATOR

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Ohio	Yes	8/1/2019	\$100,000 in-state sales or 200 transactions
Oklahoma	Yes	7/1/2018	\$10,000 in-state sales (register or report)
Pennsylvania	Yes	4/1/2018 for \$10k 7/1/2019 for \$100k	\$10,000 in-state sales (register or report) until 6/30/2019 \$100,000 in-state sales (register and collect) can no longer provide notice and report as 7/1/2019
Rhode Island	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
South Carolina	Yes	11/1/2018 (date being challenged) 4/26/2019 (by statute)	\$100,000 in-state sales
South Dakota	Yes	3/1/2019	\$100,000 in-state sales or 200 transactions
Tennessee	Proposed	TBD	\$500,000 in-state sales
Texas	Yes	10/1/2019	\$500,000 in-state sales
Utah	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions
Vermont	Yes	6/4/2019	\$100,000 in-state sales or 200 transactions
Virginia	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Washington	Yes	10/1/2018 3/14/2019 for \$100K	\$100,000 in-state sales or 200 transactions until 3/13/2019 \$100,000 in-state sales as of 3/14/2019
West Virginia	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Wisconsin	Yes	10/1/2018	\$100,000 in-state sales or 200 transactions
Wyoming	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions

SALES TAX NEXUS: AFFILIATE / CLICK-THROUGH NEXUS

NEXUS ISSUES

- > Can a third party's activity in a state confer nexus on an out-of-state seller?
 1. Affiliate / Click-Through Nexus – New York's Amazon Law.
 - > Several states now impose some sort of affiliate nexus, including: AL, AR, CA, CT, DC, FL, GA, HI, IA, ID, IL, KS, KY, LA, MA, MD, ME, MI, MN, MO, NC, ND, NE, NJ, NM, NV, NY, OH, OK, PA, RI, SC, SD, TN, TX, UT, VA, VT, WA, WI, WV, WY
 - > Several states now impose some sort of Amazon (Click-Through) nexus, including: CT, GA, ID, IL, KS, LA, ME, MI, MN, MO, NC, NJ, NV, NY, PA, RI, TN, VT,

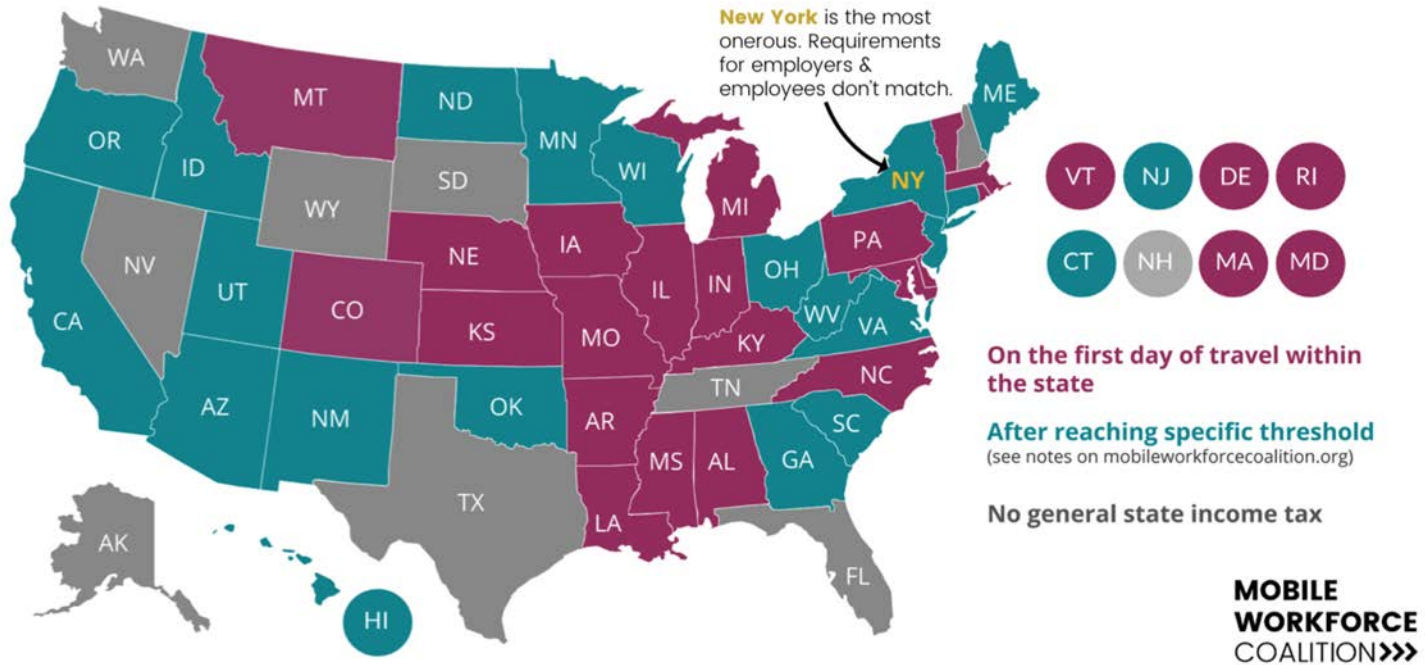


EMPLOYEE WITHHOLDING

- How do states identify potential audit candidates?
 - Withholding tax audits – Focus on travel and entertainment
 - Related audits
 - Newspapers
 - Clever use of databases
 - Trigger audits of executives (even if below threshold)



EMPLOYEE WITHHOLDING



More than half of the states that have a personal income tax require employers to withhold tax from a nonresident employee's wages beginning with the *first day* the nonresident employee travels to the state for business purposes (maroon states on the map above). Other personal income tax states provide for a threshold before requiring tax withholding for nonresident employees (teal states).

Please note that this map only covers *withholding*--many states have different (and usually lower) standards for imposing tax on nonresidents (that is, the employee may owe tax even where the employer is not required to withhold tax).

Map also does not include reciprocal agreements.

WITHHOLDING THRESHOLDS

- **Arizona** | is in the state for more than 60 days in a calendar year.
- **California** | earns in-state wages above the state's "Low Income Exemption Table."
- **Connecticut** | is in the state for more than 14 days in a calendar year.
- **Georgia** | is in the state for more than 23 days in a calendar year or if \$5,000 or more or 5% or more of total income is attributable to Georgia.
- **Hawaii** | is in the state for more than 60 days in a calendar year.
- **Idaho** | earns in-state wages of \$1,000 or more in a calendar year.
- **Maine** | is in the state for more than 12 days in a calendar year or has gross income of \$3,000 or more.
- **Minnesota** | earns a specified amount in a calendar year (currently \$12,200).
- **New Jersey** | earns in-state wages that equals or exceeds the employee's personal exemption in a calendar year.
- **New Mexico** | is in the state for more than 15 days in a calendar year.
- **New York** | is in the state for more than 14 days in a calendar year.
- **North Dakota** | is in the state for more than 20 days in a calendar year and is a resident of a state that provides similar protections (such as reciprocal agreements; certain occupations not protected).

WITHHOLDING THRESHOLDS

- **Ohio** | earns in-state wages of \$300 or more in a calendar quarter
- **Oklahoma** | earns in-state wages of \$300 or more in a calendar quarter.
- **Oregon** | earns in-state wages equal to or exceeding the employee's standard deduction.
- **South Carolina** | earns in-state wages of \$1,000 or more in a calendar year.
- **Utah** | *employer* (not employee) does business in the state for more than 60 days in a calendar year.
- **Virginia** | earns in-state wages equal to or exceeding the employee's personal exemptions and standard deduction or filing threshold (if elected by the employee).
- **West Virginia** | earns in-state wages equal to or exceeding the employee's personal exemptions.
- **Wisconsin** | earns in-state wages of \$1,500 or more in a calendar year.

POLLING QUESTION 3

Sales tax nexus currently requires:

1. Some level of economic presence.
2. Sales in excess of \$1,000,000.
3. Corporate headquarters in the state.
4. More than 15 employees in the state.

NEXUS AND TELECOMMUTING

- Telecommuting employees can create nexus for:
 1. Employer (withholding taxes, income and franchise taxes, as well as sales and use taxes)
 2. Employee (personal income tax)

- Employee withholding
 - > Employee nexus
 1. Resident: Subject to tax on all income in resident state
 2. Nonresident: Taxable only on income “sourced” in state

 - > Employer nexus
 1. Statutory nexus triggered by “doing business” or “transacting business” in-state, maintaining an office, owning or leasing property, or having employees performing services for the employer in-state
 2. Telecommuting employees can create an in-state presence for employers

TELECOMMUTING ISSUES

- NJ's *Telebright v. Director of Taxation*, 25 N.J. Tax 333 (2010), *aff'd* 2012. Software engineer worked at home, triggered the tax on her employer.
- NY's Convenience of the Employer Rule has same effect and creates potential problems for employers.
- IN, KY, MD, MS, and OK have stated that a telecommuter will not establish nexus.
- IL – one employee can trigger nexus for the employer.

TELECOMMUTING ISSUES (CON'T.)

➤ Ohio Department of Taxation website:

1. “Our company has an employee that works out of their home in Ohio. Are we required to withhold Ohio income tax on the employee’s compensation?”
2. Answer: “Yes, you must withhold Ohio income tax. Your company is transacting business in Ohio since you have an employee working in Ohio.”

CONVENIENCE OF THE EMPLOYER RULE

- Telecommuting Issues: Convenience of the Employer Rule
 - What does the rule require?
 - When employees commute to non-resident states to work for an employer, they must pay tax on income earned from these work days spent in the non-resident states (not independent contractors).
 - To limit a non-resident's ability to reduce his or her tax liability by working from home, a handful of states have adopted a “convenience of the employer” rule.
 - The terms of the convenience rule simply provide that days worked from home would be treated as work days in the non-resident states, unless the non-resident employee worked outside of the non-resident state by necessity.

CONVENIENCE OF THE EMPLOYER RULE

- Telecommuting Issues: Convenience of the Employer Rule
 - The following states impose the Convenience of Employer Rule and it creates potential problems for employers:
 1. Delaware
 2. Nebraska
 3. New Jersey
 4. New York
 5. Pennsylvania
 6. Connecticut (passed 7/1/18)
 - The rule can lead to double taxation!!

FEDERAL LEGISLATION

➤ Mobile Workforce And State Income Tax Simplification Act

- Some form of this legislation has been proposed in seven of the past nine years.
- The 30-day rule
- Employees working in nonresident states for 30 days or fewer remain fully taxable in their resident state, for all earnings.
- If the employee works more than 30 days in a nonresident state, he or she has to file income tax returns there.
- If the employee works more than 30 days in a nonresident state, then the employer must withhold.

POLLING QUESTION 4

- The following states impose a Convenience of the Employer Rule, except:
1. Connecticut
 2. New York
 3. New Jersey
 4. Pennsylvania
 5. They all have convenience rules.

OTHER CONSEQUENCES

A. State Unemployment Insurance (UI)

- Where is the worksite?
- Four Factors
 - Are employee's services located within state?
 - Where is employee's base of operations?
 - Where does the employer exercise direction and control over the employee?
 - If nothing else works, where is employee's residence?
- UI audits trigger IRS and state withholding audits.
- Statute of limitations issues

OTHER CONSEQUENCES (CON'T.)

B. Workers' Compensation

Based on employee who is “regularly employed” in state.

C. Uncollected withholding taxes can trigger personal liability on all responsible officers.

TRICKY PROBLEMS AND PRACTICAL SOLUTIONS

- How do you count a “day”?
- What is the proper denominator?
- Bonuses
- Severance (for past or future services?)
- Stock options
 - New York: Grant to vest
 - California: Grant to exercise
 - Connecticut: Grant to exercise
 - Credits for taxes paid to other states may not sync
- Retirement income – Public Law 104-95
- Special rules for professional athletes, entertainers, public figures & employers involved in the business of interstate transportation
- Rewards for whistleblowers
- IRS information sharing

EMPLOYEE-RELATED CONCERNS – THE NEW YORK EXAMPLE

- States look beyond borders to collect owed taxes, New York Times, March 21, 2010
- *Nathaniel Moore* TSB-A-89(2)I
- Failure to file a return is a crime. *See* New York Tax Press Release, June 28, 2012
- Might be a “zero sum game” for many employees
- Statute of limitations concerns

TRICKY PROBLEMS AND PRACTICAL SOLUTIONS

➤ Compliance Worksheet (Matrix)

- How many employees in state?
- How often?
- Is there a *de minimis* rule?
- Does the state aggressively audit withholding issues?
- Are there reciprocal agreements?

MANAGING COMPLIANCE AND PRACTICAL SOLUTIONS

Sample Compliance Chart

State	No of Visits	No of Employees who visit	De Minimis or Reciprocity	Potential Exposure	Action
NY	100	10	14-day rule	Significant	NY is <u>very</u> aggressive. Consider voluntary disclosure
IL	50	5	IA, KY, MI and WI	Minimal	IL activities could be considered temporary/transitory - possible future compliance
NV	100	100	No PIT	\$0	Relax
SC	20	4	\$1,000	Low – some employees possibly below threshold	Nothing for now

- Consider use of Multistate Tax Commission voluntary disclosure program.

OTHER ISSUES

- Credit for employee - paid taxes
- System for tracking
- Always get state version of W-4
- Structure post-employment relationship
- SOX § 404
- Voluntary Disclosure or Amnesty
 - use of MTC (withholding covers all states except: CA, DE, IL, IN, ME, MS, NY, OH, PA, and VA) or
 - state-by-state filings

POLLING QUESTION 5

- Federal law may prohibit the taxation of the following type of income, except in the taxpayer's state of domicile:
 1. Stock option income
 2. Severance pay
 3. Bonuses
 4. Retirement income


THANK YOU



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