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Sales Tax Nexus

The *Wayfair* Decision - 2 Years Later

It's been two years since the US Supreme Court's decision in *Wayfair v. South Dakota* opened the door for states to impose "economic nexus" on remote sellers for sales tax purposes. A lot has happened in those two years.

What is *Wayfair*?

In *Wayfair* the court held that a business with no physical presence in South Dakota nevertheless has a sales tax collection and filing requirement if its sales to in state purchasers exceed $100,000 or 200 transactions. The *Wayfair* decision overturned the Court's 25-year-old *Quill* decision which had established the physical presence standard for the imposition of sales tax by a state.

Almost immediately, other states began enacting similar economic nexus provisions. In fact, some states (like Massachusetts) already had enacted economic nexus provisions that were just waiting for the *Wayfair* decision to validate them.

What is "Nexus"?

In short, "nexus" is the "minimum connection" that a business must have with a taxing state before the state can impose a tax collection or reporting requirement upon the business

NEXUS = TAX REPORTING REQUIREMENT

Where are we now?

As of the date of this article 44 of the 46 states that impose a sales tax have enacted economic nexus thresholds, and the two hold-outs (Florida and Missouri) are considering economic nexus legislation.

The states that don't impose a sales tax can be remembered by the acronym "NOMAD" (New Hampshire, Oregon, Montana, Alaska and Delaware). However, Alaska (which only imposes local-level sales taxes) recently had several localities enact their own economic nexus provisions. So, really, it's now "NOMD".

Most states' economic nexus thresholds are $100,000 or 200 transactions (same as the South Dakota thresholds upheld in *Wayfair*), but some are higher. A few states apply a $10,000 sales threshold.

• ***When does the economic nexus reporting requirement start?***

States vary with regard to the effective dates of their economic nexus provisions. Some states' provisions became effective on the date that the *Wayfair* decision was issued, while others have more recent effective dates, and a few (like Massachusetts) became effective prior to *Wayfair*.

States also vary regarding the measurement periods that they use to determine whether a business' sales have exceeded these thresholds. For example, some states use the prior calendar year's sales, while others apply a rolling one-year average, and others look to both the current and prior calendar years' sales (triggering nexus if either year's sales exceed the threshold).

• ***Don't forget physical nexus***

Keep in mind that physical activity in a state still creates nexus even if your sales don't exceed the state's economic nexus thresholds. This physical activity could be as simple as sending sales reps into a state to call on customers or prospects, or sending an employee or contractor into a state to perform services. Yes, the activities of contractors that you engage to perform services for your customers can create nexus for your company as easily as if you sent your own employees to do the work.

But wait, there's more…

• ***Marketplace Facilitators***

States quickly figured out that online marketplace platforms (like Amazon and eBay) had significant sales being made by small remote sellers using these platforms. Although the individual sellers didn't exceed the states' new economic nexus thresholds, the aggregate totals for all sellers on the platform far exceeded these thresholds.

In order to capture these sales for taxation, states began enacting "marketplace facilitator" economic nexus thresholds. These provisions typically define a "marketplace facilitator" as a business that provides e-commerce infrastructure, customer service, payment processing services and marketing for sellers who utilize their platform to make online sales. Under these new laws, the marketplace facilitator (rather than the individual seller) is required to register and collect sales tax as if it were the retailer if the total sales for all sellers via its platform to in-state customers exceed the statutory threshold.

Currently 43 of the 46 states that impose a sales tax (plus some Alaska localities) have enacted marketplace facilitator economic nexus thresholds. Most of these thresholds were the same as the $100,000 or 200 transactions thresholds upheld in *Wayfair*. Therefore, most marketplace facilitators are now required to collect and remit sales tax in these states on behalf of their individual sellers. If you sell on these platforms as well as via your own website, it is likely that (for most states) you only need to collect tax on the sales made via your own website.

BUT… be very careful to confirm where your marketplace facilitator is versus is not collecting sales tax. REMEMBER…if your business has nexus with a state, the ultimate responsibility for tax collection falls on you.

What does this mean for your business?

- Any business making sales of products or services to customers located outside of their headquarters state is at risk for sales tax nexus.
- Businesses often don't have the internal systems and processes to comply with these new filing obligations.
- Technology, software, digital products and cloud computing businesses are particularly hard-hit because an ever-increasing number of states now tax these products which typically weren't taxed in the past.
- Sales tax has become one of the top due diligence focus areas in business acquisition transactions and a significant driver of contingent liability escrows in such transactions.
- Businesses making sales via marketplace platforms as well as their own website must be careful to identify what they are required to report versus what the marketplace facilitator is required to report.
- Businesses which may not think of themselves as a "marketplace facilitator" are finding that they fall under these provisions.

*****KEEP IN MIND: Sales tax typically is your customer's liability… HOWEVER… it becomes your liability if you fail to collect it from the customer. That is a real impact to your bottom-line.**

How can WebsterRogers help?

WebsterRogers' SALT professionals can help you get ahead of sales tax requirements so that you can focus on growing your business. We help your company go from sales tax risk to sales tax compliance by:

- Identifying where you have nexus;
- Evaluating taxability of your products and services;
- Identifying and documenting exemptions;
- Considering tax planning strategies;
- Remediating prior exposure via amnesty and voluntary disclosures ("VDAs");
- Filing registration applications and setting up online taxpayer accounts;
- Helping identify and implement sales tax systems that fit your business needs;
- Training your employees on basic sales tax concepts impacting their daily work;
- Designing and helping to implement go-forward processes for sales tax; and
- Keeping you up-to-date on sales tax issues impacting your business.

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