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Navigating the Post-Wayfair World Part One: States Respond to the Supreme Court's Wayfair Decision

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It has been six months since the United States Supreme Court issued its landmark decision in *South Dakota v. Wayfair, Inc.* We wrote about the Supreme Court's decision here. As predicted, the Court's decision has fundamentally changed the sales and use tax landscape. Since June 2018, over 30 states have enacted legislation or issued interpretive guidance adopting new economic nexus laws in light of the Court's decision. This rapid development has been complicated by a lack of uniformity across state lines; leaving businesses to grapple with a patchwork of new standards and thresholds.

Though uncertainties remain, one thing is clear: the days of passive compliance are over. Businesses can no longer wait for sales tax notices to arrive in the mail before they consider their out-of-state sales tax obligations. To avoid possible financial harm in the form of taxes, penalties, and interest, businesses must take immediate and strategic action to determine how new sales tax laws impact their operations and compliance obligations.

This *Legal Update* is the first installment in a three-part series geared towards helping businesses navigate sales and use tax laws post-*Wayfair*. In Part One, we discuss how states have responded to the *Wayfair* decision and highlight key variations across state laws. In Part Two, we take a closer look at Wisconsin's recently amended sales and use tax statutes. In Part Three, we offer practical advice and tangible action items for businesses moving forward in this Post-*Wayfair* world.

Background

A state must have a strong connection, also known as "nexus," to an out-of-state business before it can impose sales and use tax obligations on that business. Previously, physical presence was the law of the land—a business had to have an office, warehouse, employees, or some other physical presence in the taxing state for tax nexus to exist. In 2018, the Supreme Court overturned the decades-old physical presence requirement and ruled that states can impose sales tax obligations on out-of-state businesses with no physical presence in the state.

Post-*Wayfair*, nexus exists for sales tax purposes when a "taxpayer 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." Nexus can still be established by physical presence, but can now also be established by economic or virtual contacts. This new standard, referred to as economic nexus, significantly expands taxpayers' obligations to report, collect and remit sales tax.

Economic Nexus

Economic nexus exists when a business engages in a certain amount of economic activity in a particular state. If the business exceeds certain thresholds—the "sales threshold" and/or the "transaction threshold"—the business is obligated to register, report, collect and remit sales and use tax in the particular state, regardless of physical presence. The sales threshold evaluates the amount of sales a business makes to residents within the state. The transaction threshold considers how many individual transactions are conducted by the business within the state. Businesses that fall under these thresholds are exempt from sales tax obligations under a small seller exception. However, even exempt small sellers may be subject to state notice and reporting requirements.

The Supreme Court in *Wayfair* did not provide bright-line rules or universal thresholds. Instead, the Court gave states broad authority to adopt and implement state-specific nexus standards. Therefore, businesses must monitor developments in states where they have economic ties and develop a strategy for compliance.

Economic Nexus Laws, By State

As of late January 2019, over 30 states have proposed or enacted new economic nexus laws in light of *Wayfair*. Of the states that have enacted economic nexus laws, most have already taken effect.

Status of Economic Nexus Laws (as of January 2019)	**States**
Economic nexus laws **enacted** and **in effect**	Alabama, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin
Economic nexus laws **enacted** but **not in effect**(pending litigation)	Tennessee
Economic nexus laws **enacted** with **upcoming**enforcement	Wyoming – enforced February 1, 2019 California – enforced April 1, 2019 Colorado – enforced June 1, 2019 Pennsylvania – enforced July 1, 2019 Texas – enforced October 1, 2019
Economic nexus laws **proposed**	Arkansas, Kansas, Louisiana, New Mexico
No Action	Arizona, Florida, Missouri, Virginia
No Sales Tax	New Hampshire, Oregon, Montana, Alaska, and Delaware

State Variations

Economic nexus laws vary from state to state, and these variations require careful attention. The devil is in the details: slight differences and nuances can create entirely different requirements, even between neighboring states. Below is a list of key variations that businesses should be on the lookout for when reviewing state laws.

1. **Sources of Law.** States have taken different approaches in terms of *how* they are embracing economic nexus standards. A handful of states already had laws on the books that became effective at the time of the *Wayfair* decision. Many others passed legislation shortly after the decision came out in mid-2018. Other states have issued guidance that implements new standards by interpreting existing law. Guidance can take many forms, including notices or bulletins posted on state department websites. Businesses should routinely monitor relevant state revenue departments' websites to stay up to date on developments.

2. **Sales Thresholds.** Sales thresholds across states vary from $10,000 to $500,000 in sales. Many states have embraced the sales threshold ($100,000) set forth by South Dakota. Some states have higher sales thresholds, including Alabama ($250,000), Connecticut ($250,000), Georgia ($250,000), Massachusetts

($500,000), Mississippi ($250,000), New York ($300,000), Ohio ($500,000) and Tennessee ($500,000). One state currently has a lower sales threshold, Oklahoma ($10,000).

3. **Basis for measuring sales.** States may base the sales threshold on gross sales, gross revenues, retail sales, gross receipts, or taxable sales. In addition, a number of states do not distinguish between taxable and non-taxable sales when determining if the sales threshold is met.
4. **Transaction Thresholds.** Again, many states have embraced the transaction threshold (200 transactions) set forth by South Dakota. However, a handful of states do not have a transaction threshold at all including, Alabama, Mississippi, South Carolina, and Tennessee. For purposes of nexus, a transaction may be very broadly defined.
5. **Thresholds ("Or" vs. "And").** In most states, only one of the thresholds must be met before obligations are imposed (i.e., a seller who exceeds the sales threshold **or** the transaction threshold must collect and remit). However, three states—Connecticut, New York, and Massachusetts—require both thresholds be satisfied (i.e., a seller who exceeds the sales threshold **and** the transaction threshold must collect and remit).
6. **Lookback Period.** The relevant lookback period for determining if the thresholds are met also varies. Some state laws look to the previous year's sales history, while others consider both the previous year and the current year. In some instances, "year" is defined as the tax year, and in others, the calendar year.
7. **Reporting Requirements**. One key strategy businesses facing nexus need to develop is what to do about prior years. Some states allow so-called "voluntary disclosure" to account for past years; other states have no such period of redemption. See, http://www.mtc.gov/Nexus-Program/Multistate-Voluntary-Disclosure-Program for more information. At issue is whether a business feels it necessary to file tax returns to toll the statute of limitations on previously-questionable years.

Retroactivity

A key question coming out of *Wayfair* was whether states could retroactively apply economic nexus standards. Few states have attempted retroactive enforcement, and those that have, have experienced strong pushback. We are monitoring litigation in Massachusetts over the collection of taxes on online sales dating back to June 2018. We are also awaiting additional guidance from New York as to whether the state plans to collect retroactively.

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