

Is Your Business Prepared for Major Changes in State Sales Tax Laws?

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Does your business sell products online? If so, listen up, for the tides are changing in the online retailer landscape as the Supreme Court recently struck down its 1992 decision of *Quill v. North Dakota*. In *Quill* the Supreme Court upheld a state sales tax based on a businesses nexus or physical presence within the state. A business has a nexus or physical presence when there is property, such as an office located in the state or payroll sourced to employees performing work in the state. As you can see, physical presence or present employees does not capture a business that sells online. However, the Supreme Court on June 21, 2018, in *South Dakota v. Wayfair, Inc.*, addressed sales tax pertaining to online business and upheld the constitutionality of South Dakota Senate Bill S.B. 106. Senate Bill S.B. 106 allowed South Dakota to collect state sales tax at the time of purchase from out-of-state online retailers (with no physical presence/nexus) who exceed minimum thresholds of sales or transactions. The precedent in *Wayfair* establishes a framework for other states to enact or amend current law concerning internet sales.

However, the new framework in *Wayfair* is causing nationwide concern. The major concerns we receive from our clients at The Center for Financial, Tax Planning & Accounting (The Center) is of course, how will the new sales tax law affect my business? Will my business be retroactively forced to pay unpaid sales tax and what should my business do moving forward? At The Center we have derived our analysis from the data made available subsequent to the *Wayfair* ruling and we can conclude the changes to state sales tax laws will not take place over night. However, changes loom as the landscape is uncertain and states look for opportunities of revenue. The state-to-state difference in sales tax laws requires a constant monitoring of state legislation. While it may be difficult to monitor sales tax laws in all fifty states, it does not prohibit a comprehensive analysis in light of *Wayfair* to protect your business moving forward.

Based on *Wayfair's* framework we can derive legal parameters to serve as guidelines for states looking to amend their ecommerce sales tax laws. The main parameters established in *Wayfair* pertain to a safe harbor for businesses that sell limited amounts of online retail in the state. To exceed the safe harbor threshold, a business must have one hundred thousand dollars in ecommerce sales or two hundred plus separate transactions of products transferred or sold electronically. Additionally, there will be no retroactive tax collection and the law must be a simplified state-level administration of sales tax. A state that attempts to collect ecommerce sales tax in a manner outside these parameters will certainly be subject to legal challenge.

Currently, there are approximately twenty states that have passed regulations, or have pending regulations similar to South Dakota Senate Bill S.B. 106. The thresholds range from ten thousand dollars of in-state sales in Oklahoma and Pennsylvania to two hundred fifty thousand dollars in in-state sales in Mississippi, but the majority of the states have similar standards of one hundred thousand in sales or two hundred separate sales transactions. The key question is what does this mean for your business? It could mean keeping detailed records of states where substantial business is done. Only you, the business owner, know if your business is nearing a *Wayfair* parameter (one-hundred thousand dollars in ecommerce sales or two hundred plus separate transactions) thus, you'll need to keep adequate sales records.

Furthermore, it's important to understand while *Wayfair* is aimed at the sales tax of online retailers, some experts believe states will attempt to expand *Wayfair's* scope. One potential expansion of *Wayfair* pertains to companies who use a digital format for employees. The digital format allows employees to engage consumers outside of the company's state of incorporation, yet lets the company avoid the physical presence test that subjects the company to state sales

tax. There's a push to end such behavior, however as previously stated, a legal challenge would likely follow based on a scope outside of *Wayfair's* parameters.

There's been a push by some in Congress to remedy the disparity between state sales tax laws. In the past, Congress has seemingly avoided taking action on the growing disparity between in-state and out-of-state retailers. However, today, there are numerous pieces of legislation being pushed by the House and Senate. House Representative Kristi Noem from South Dakota is pushing the Remote Transactions Parity Act to cure what she calls post-*Wayfair* a state sales tax "free-for-all". A group on the Senate Committee of Finance is looking to adopt a new act cleverly named, "Stop Taxing Our Potential Act of 2018", which will look to undo the *Wayfair* ruling (S.3180-115th). Yet some experts suggest Congress could enact something similar to the Streamlined Sales and Use Tax Agreement (SSUTA). SSUTA is an agreement between twenty-four states (including South Dakota) that focuses on the improvement of sales and use tax implementation for all sellers and all types of commerce. SSUTA acts to simplify the administration of state sales tax while providing uniformity to a multi-state platform.

At the moment, it's apparent there are many moving parts to state sales tax laws. It's important to maintain adequate records if your company participates in online retail. Moreover, it's important to have someone in your corner who understands and closely monitors the evolution of state sales tax laws. If your business deals with online sales you may want to consider keeping detailed records for sales done in each state so you are ahead of any taxes or potential taxes. Additionally, if you have questions over the new tax laws, please contact us at The Center for Financial, Legal & Tax Planning, Inc., at (618)-997-3436. We have experts that are available to answer your questions, and help you and your business.