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What is State Tax Nexus and How Does the Supreme Court's *Wayfair* Decision Change Things?

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Nexus and *Wayfair*

Agenda

- Nexus background
- What is the significance of *Wayfair*?
- What's next?
- How does this affect you?
- What issues were not addressed?

State & Local Tax Background

- 50 states
- 10,000 Sales/Use Tax jurisdictions
- Various Tax Types
  - Income Tax
  - Sales/Use Tax
  - Others

State & Local Tax Background

- “Nexus” is the state’s jurisdiction to impose tax
- Sales/use tax – nexus creates responsibility to collect tax from customers and remit to the state
- Income tax – nexus creates responsibility to file return and pay income taxes

State & Local Tax Background

- Commerce Clause (Art. 1 Sec. 8)
  - Congress shall have Power…to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.
- Due Process Clause (Amendment XIV)
  - …nor shall any State deprive any person of life, liberty, or property, without due process of law.
- Public Law 86-272
  - No state shall have the power to impose a net income tax on income derived within such state by any person whose only activity in the state is the solicitation of sales of tangible personal property.

History of Sales Tax Nexus

A quick history of physical presence

- Pre-1967 – Physical presence requirement was assumed
- 1967 – *National Bellas Hess v. Department of Revenue* – Physical presence explicitly required for sales tax
- 1967-late 1980s – SCOTUS erodes physical presence requirement in the context of products liability cases
- 1992 – *Quill Corp. v. North Dakota*
- 1993-2017 – States undermine physical presence requirement
- 2018 – *South Dakota v. Wayfair*

Quill: A Nexus Story

- “Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*.”
- “While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases.”
- “This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.”

History of Nexus and the Supreme Court

- **1993-2017** – States undermine physical presence requirement
- **2015 – *Direct Marketing Association v. Brohl*** – Justice Kennedy (dissent): "In *Quill*, the Court should have taken the opportunity to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy … Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, Quill now harms States to a degree far greater than could have been anticipated earlier."
- **2018 – *South Dakota v. Wayfair***

WAYFAIR – What was the result?

Economic Nexus – What does it mean

- Physical presence is not necessary in the state
- Purely shipping goods into the state is sufficient
  - What about digital goods?
  - What about services?
- "How am I supposed to know how to collect (not to mention remit) that state's sales tax?" "Should I panic?!"

WAYFAIR – What was the result?

Guidelines

- Safe harbor provided:
  - South Dakota $100,000 sales/200 transactions
- Prospective only
- Streamline Sales Tax member
  - Single state level administration
  - Uniform definitions of products and services
  - Simplified tax rate structures
  - Access to sales tax administration software

WAYFAIR – What about other states' Quill attacks?

Other Issues

- Cookie nexus – Massachusetts (retroactive)
- Reporting legislation – Colorado + ~15 other states
- Marketplace collection

WAYFAIR – What do states need to do to require collection

Does a state need to be non-retroactive?

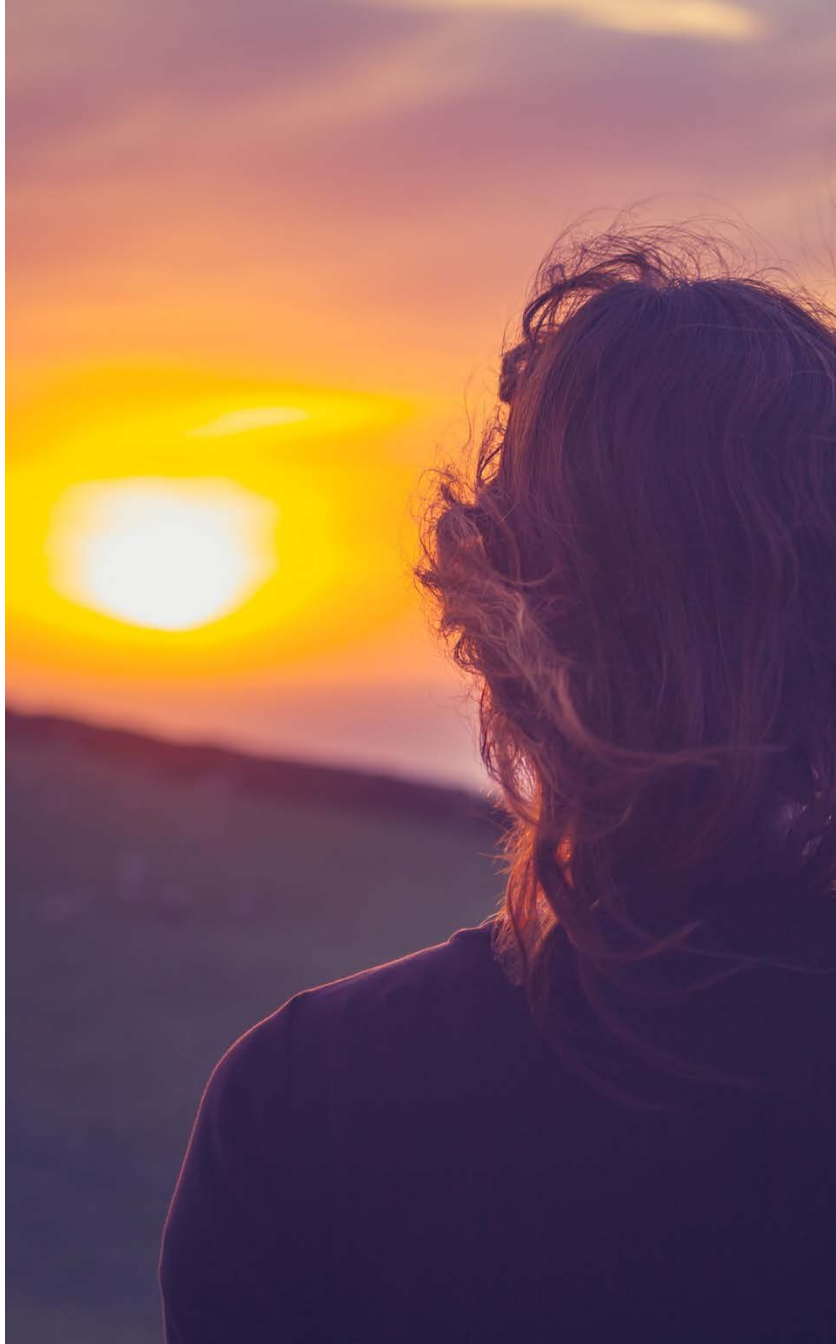
- Probably

Does a state need to adopt $100,000 threshold?

- A state probably needs a minimum standard, but note that it needn't necessarily be statutory
  - Mississippi has adopted a $250,000 threshold by rule
- Some states have adopted a $10,000 threshold for marketplaces
  - Oklahoma and Pennsylvania have adopted $10K for collection/reporting alternatives
  - Minnesota has adopted $10K as the attributional threshold for marketplace sellers

WAYFAIR – What’s next?

- Guidance by states
- Which states meet the requirements?
- Will states be kind?
    - There appears to be a general understanding that states must give vendors an opportunity to figure out how to comply – e.g., Alabama has extended the compliance date to 10/1/2018



Washington

- Economic Nexus for Business & Occupation (“B&O”) tax.
  - Applies to wholesaling (effective 9/1/15), retailing (effective 7/1/17), and apportionable (effective 6/1/10) gross receipts for B&O tax purposes.
  - Thresholds:
    - more than $53,000 of payroll in another state or country in 2017, $57,000 in 2018
    - more than $53,000 of property in another state or country in 2017, $57,000 in 2018
    - more than $267,000 of gross receipts in the other state or country in 2017, $285,000 in 2018
    - at least 25 percent of its total property, payroll, or receipts in another state or country in 2017 or 2018

Washington

- Retail Sales Tax Nexus
  - Beginning January 1, 2018, remote sellers making $10,000 or more in retail sales to Washington purchasers must either:
    - Collect and remit sales/use tax on sales to Washington purchasers
    - Follow the use tax notice and reporting requirements.
      - Transactional and annual notices required
      - Minimum $20,000 penalty for non-compliance
  - No physical presence required
  - As a result of SD v. Wayfair, effective 10/1/2018, remote sellers meeting the following thresholds must register and collect retail sales tax from WA purchasers:
    - More than $100,000 in annual gross retail sales to WA consumers; or
    - Exceeding 200 annual retail transactions to WA consumer.

WAYFAIR – How does this affect you?

- Don't Panic!
- Determine states where you need to register
- Determine the taxability of the product/services
- Set-up processes and systems to collect and remit tax
- What if I don’t meet the thresholds and do not register in a state?
  - Reporting requirements
  - Marketplace sellers required to collect

WAYFAIR – What was the result - Review

Guidelines

- Safe harbor provided:
  - South Dakota $100,000 sales/200 transactions – What about that 200 transactions?
- Prospective only
  - Some states may try to assert retroactivity – Can they?
- Streamline Sales Tax member
  - Single state level administration
  - Uniform definitions of products and services
  - Simplified tax rate structures
  - Access to sales tax administration software

Key Takeaways

1. Physical presence is no longer the rule; economic presence will be relied on moving forward.

2. There will be uncertainty over the next 3-6 months as states respond differently to the SCOTUS ruling.

3. Don't panic. Stay informed, be methodical in your approach, and seek advice as needed to navigate the coming changes.

Solutions By State

Economic Nexus States – as of 10/01/18

State	Effective Date
Alabama*	10/1/2018
Colorado*	12/1/2018
Connecticut*	12/11/2018
Georgia*	1/1/2019
Hawaii*	7/1/2018
Iowa*	1/1/2019
Illinois	10/1/2018
Indiana	10/1/2018
Kentucky*	7/1/2018
Louisiana*	1/1/2019
Maine	7/1/2018
Maryland*	10/1/2018
Massachusetts*	10/1/2017[1]
Michigan*	10/1/2018
Minnesota*	10/1/2018
Mississippi	9/1/2018

State	Effective Date
Nebraska*	1/1/2019
New Jersey*	10/1/2018
North Carolina*	11/1/2018
North Dakota*	10/1/2018
Ohio	1/1/2018
Oklahoma*	7/1/2018
Pennsylvania	3/1/2018
Rhode Island*	8/17/2017
South Dakota*	11/1/2018
Tennessee*	7/1/2017
Utah*	1/1/2019
Vermont*	7/1/2018
Washington*	10/1/2018
Wisconsin*	10/1/2018
Wyoming	TBD

SSUTA Member States WITHOUT Economic Nexus (today)

Kansas
Nevada
West Virginia

[1] Cookie Nexus

SSUTA Member State

*MTC VDA Program Member State

Oregon Enterprise Zones

Oregon Enterprise Zone ("E-Zone") Program

The Oregon E-Zone Program offers an exemption from property taxes for certain businesses that locate or expand their operations within a designated E-Zone. There are currently 69 E-Zones in Oregon and are created and managed by local governments.

Standard Program: A business qualifying under the program will receive a three year property tax exemption on the qualified investment property placed in service within the E-zone.

Extended Program: The property tax exemption may be extended to five years if the business meets certain employee wage requirements.

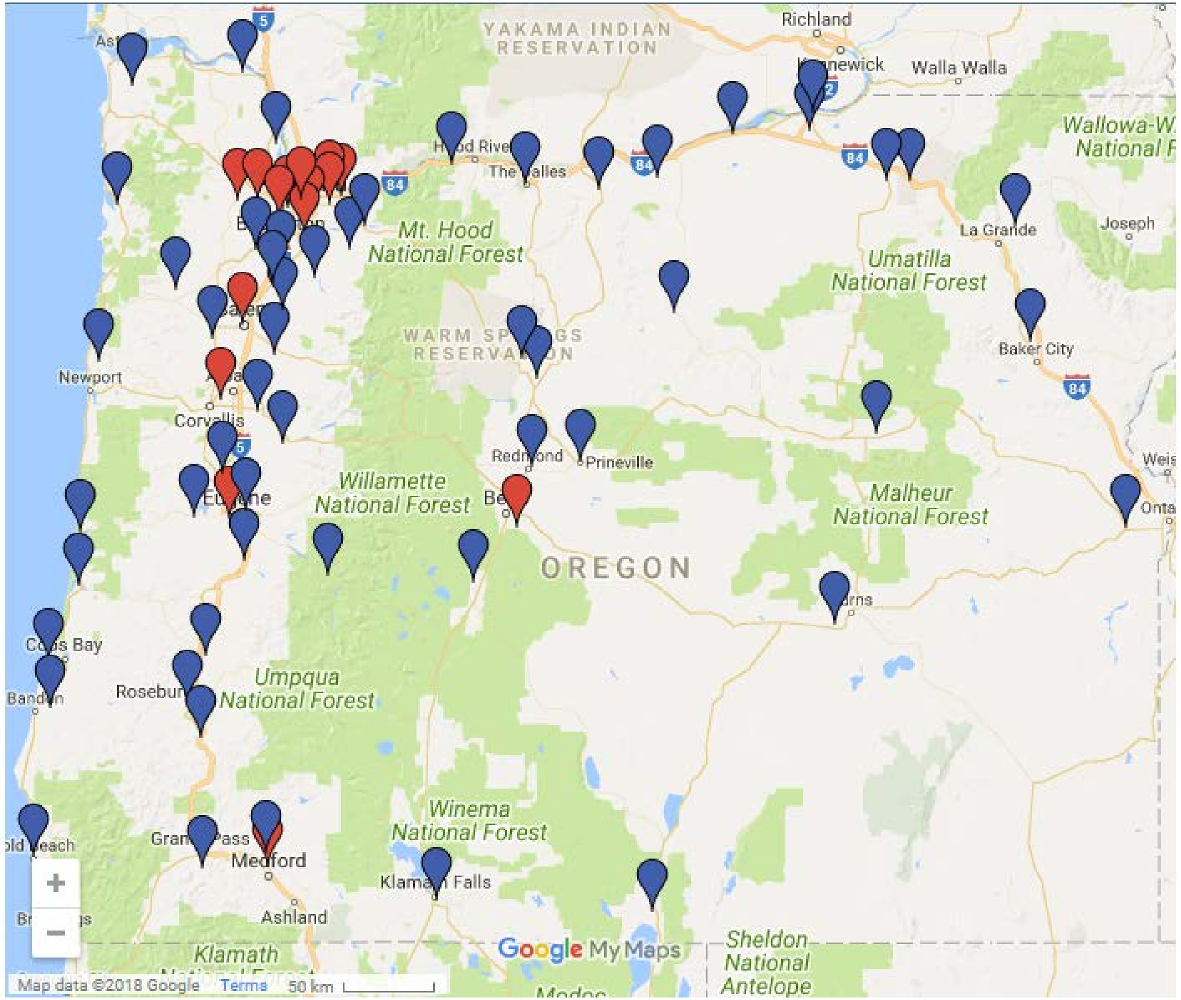
Construction-in-Process Exemption: A business may be eligible for a property tax exemption for construction in process located in an E-Zone which exempts such property for up to two years while the project is under construction.

Qualifications for E-Zone Program

In order to qualify for the E-Zone Program, a business must:

1. Be **located within an E-Zone** boundary;
2. Be a **Qualified Business**;
3. Make **Qualified Investments**; and
4. Meet **Hiring Requirements**

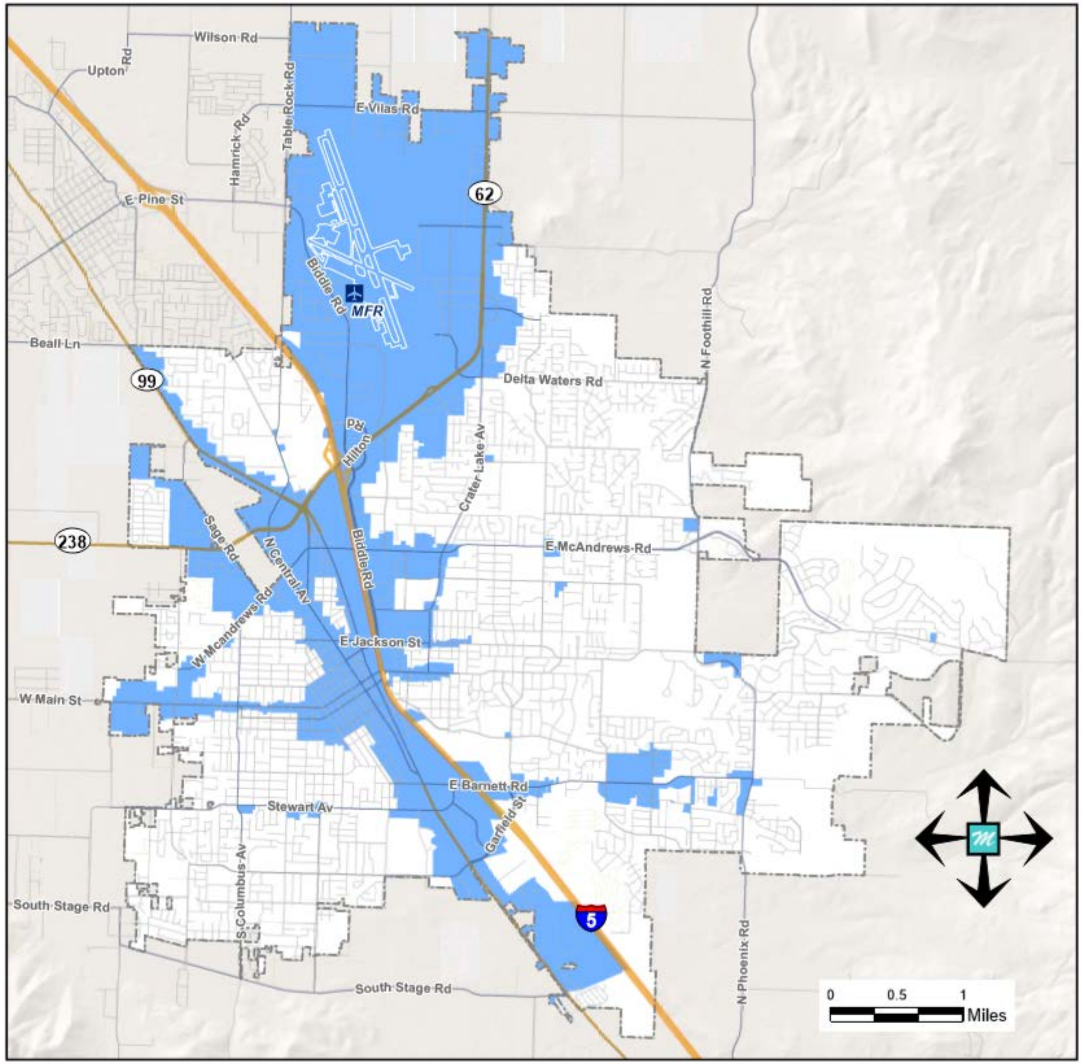
Is your business located within an E-Zone?



Rural Zone

Urban Zone

Example: Medford E-Zone



Qualified Business

Generally, a Qualified Business must be engaged in the business of providing goods, products, or services to businesses through its activities.

Qualifying	Non-Qualifying
Manufacturing	Retail
Assembly	Child Care
Fabrication	Housing
Processing	Health Care
Shipping	Tourism
Storage	Entertainment
Call-Centers	Construction
Headquarters	Financial Services
Hotels/Motels (sometimes)	Professional Services

Qualified Investments

Qualified Property	Non-Qualified Property
• Newly constructed buildings/structures • Additions or modifications to existing buildings/structures • Heavy/affixed machinery and equipment • Personal Property ≥ $50,000 per item	• Land • Supplies • Motorized operator driven machinery, equipment, or vehicles • Rolling Stock • Personal Property < $50,000 per item

Qualifying personal property (including machinery and equipment) must be installed on property that is owned or leased by the business. Additionally, qualifying personal property must be either newly purchased by the business or newly transferred into the E-Zone from outside the county.

Hiring Requirement

General Requirement: A business must increase full-time permanent employment by the ***greater of 1 employee or 10 percent*** of the company's annual average employment within the E-Zone for the previous 12 months.

- The requirement must be fulfilled no later than the date the property tax exemption is claimed on the qualified property under the E-Zone program or April 1 following the year in which the investment in qualified property is made.

Exceptions: E-Zones may authorize by resolution the waiver of the hiring requirements, provided that either one of the two following circumstances are satisfied:

1. Completing an investment of greater than or equal to $25 million; *or*
2. Demonstrating a 10 percent increase in productivity within an 18 month period.

Program Qualification Costs

The Oregon E-Zone program rules allow sponsors to impose and collect a filing fee from businesses that are approved under the program. The filing fee established by the sponsor can be up to one tenth of one percent (0.1%) of the estimated internal cost of the qualified investment expenditures incurred over the standard exemption period (3 years).

Application and Exemption Claim Process

Application for authorization must be submitted **BEFORE** hiring or site work begins.

Exemption claim must be made after January 1 but on or before April 1, in order to be exempt for the following property tax year staring July 1. Late applications are allowed with a late filing fee, ***no later than June 1***.

Long-term Rural Enterprise Zone Facilities

- Thirty-five E-Zones are categorized as Rural E-Zones.

- Businesses located within a Rural EZ may be eligible for a property tax abatement of 7-15 years (compared to the standard 3-5 years).

- In addition the property tax abatement and a construction in process exemption, an income tax credit is available (with governor approval) equal to 62.5% of gross payroll receivable over a 5-15 year period with a credit carryforward of 5 years.

- Any type of business can qualify.

Qualification for Long-term Rural Enterprise Zone

In order to qualify:

1. total facility costs must be 0.5-1% of a county's total real market value (base amount typically $1-25 million);

2. within 3-5 years of the commencement of operations, a number of new full-time employees must be hired and retained through the abatement period (number of employees varies from 10-75 depending on location); and

3. annual average compensation (including benefits) of all workers must be at least 150% of the county average annual wage. The 150% threshold is based on the latest, final figure in the fifth year of operation, upon which the minimum is set for the remainder of the abatement period.

Questions?

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