Navigating the Post-Wayfair World Part Two: A Closer Look at Wisconsin's Economic Nexus Law

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Practice Area: Business and Corporate Law & Tax

This *Legal Update* is Part Two in our three-part series: Navigating the Post-*Wayfair* World, a series geared toward helping businesses navigate the changing sales and use tax landscape. In Part One, we discussed how states have responded to the Supreme Court's landmark tax decision, *South Dakota v. Wayfair, Inc*. We emphasized that states have not followed a uniform approach in implementing economic nexus rules, and highlighted key variations across state lines. Here, we take a closer look at Wisconsin's response to the *Wayfair* decision.

Wisconsin enacted legislation in late 2018 adopting new economic nexus laws. Beginning October 1, 2018, Wisconsin requires remote sellers (out-of-state retailers) to register, collect and remit sales and use tax on sales of taxable products and services in the state. The state initially implemented economic nexus rules by issuing emergency rules, which were later codified by an amendment to the sales and use tax statutes (the "Wisconsin Economic Nexus Law"). *See*: EmR1819; 2017 Wis. Act. 368.

Under the Wisconsin Economic Nexus Law, remote sellers are required to register, collect and remit Wisconsin sales and use tax if, in the previous or current year, either criterion applies:

1. The retailer's annual gross sales into Wisconsin exceed $100,000 (the **"sales threshold"**); or
2. The retailer's annual number of separate sales transactions in Wisconsin is 200 or more (the **"transaction threshold"**).

Small Seller Exception
Remote sellers whose business activities in Wisconsin fall under the thresholds are not subject to sales tax obligations under the small seller exception. This exception comes with two important caveats. First, the exception only applies to remote sellers who do not have a physical presence in the state. Second, the exception is lost if a remote seller's business activity exceeds either of the thresholds. Sales tax obligations kick in, and the remote seller must immediately register with the Wisconsin Department of Revenue (WI DOR), when a seller makes a sale that brings its annual gross sales over $100,000 or annual number of transactions to 200. To illustrate, consider the following scenarios:

Scenario One: A remote seller does not meet either threshold in 2017 or 2018 and qualifies for the small seller exception. On February 1, 2019, the remote seller makes a sale that brings its annual gross sales for the current year (2018) to $100,001—a dollar over the sales threshold. The remote seller must register and begin collecting sales tax beginning with its **next** sales transaction in the state.

Scenario Two: A remote seller does not meet either threshold in 2017 or 2018 and qualifies for the small seller exception. On February 1, 2019, the remote seller makes a transaction that brings its number of separate sales transactions in the current year (2018) from 199 to 200. The remote seller must register and collect sales tax beginning with the **200th** transaction made on February 1.

In both of these scenarios, the remote seller would need to register, collect and remit for the remainder of the 2018 taxable year and all of 2019. If, in 2019, a seller's business activity drops below the thresholds, the seller can deactivate its seller's permit, effective January 1, 2020, and at that time, stop collecting and remitting Wisconsin sales tax.

Lookback Period
The Wisconsin Economic Nexus Law looks to the retailer's business activity in the "previous and current year" when evaluating if the threshold are met. Wisconsin defines "year" as the retailer's taxable year for federal income tax purposes. The Wisconsin Economic Nexus Law took effect on October 1, 2018. As we will discuss in Part Three of this series, the effective date of a state's economic nexus rules is an important factor when considering liability and developing a compliance schedule.

Sales Threshold
In Wisconsin, the sales threshold is determined by a remote seller's annual gross sales. Though remote sellers are only required to collect and remit sales tax on taxable sales, when evaluating annual gross sales, both taxable and nontaxable sales (i.e. sales subject to an exemption) are included. In addition, all sales into Wisconsin by the retailer on behalf of other persons and all sales into Wisconsin by another person on the retailer's behalf are included.

Transaction Threshold
Similar to the sales threshold, the transaction threshold includes both taxable and nontaxable sales, as well as sales into Wisconsin by the retailer on behalf of other persons and all sales into Wisconsin by another person on the retailer's behalf. In addition, the following nuances apply:

- An invoice is a separate sales transaction. An invoice for multiple products is still considered one separate sales transaction.
- A periodic payment of a lease or license is a separate sales transaction.
- A deposit made in advance of a sale is not a separate sales transaction.

Registration/Permits
A remote seller with an active seller's permit in Wisconsin must collect and remit, regardless of whether the retailer is actually required to have the permit. Accordingly, registered remote sellers whose business activity drops below the thresholds must inactivate their sellers' permits with the DOR; otherwise, the business is still obligated to collect and remit.

Marketplace Seller
The WI DOR has indicated through guidance that a third-party remote seller that sells through a marketplace is not required to register for Wisconsin sales tax if the marketplace is collecting and remitting tax on such sales. A marketplace that is a remote seller and does not qualify for the small seller exception is required to register, collect and remit on taxable sales made on behalf of third-party sellers.

Taxable Products and Services
Unless an exemption applies, Wisconsin sales and use tax is imposed on sales of the following:

1. Tangible personal property
2. Certain digital goods, additional digital goods, digital code
3. Taxable services
4. Coins and stamps

See: WI DOR Publication 201 for an exhaustive list of taxable items.

The WI DOR has also indicated through guidance that a remote seller who only makes nontaxable sales into the state is not subject to sales tax obligations, regardless of the sales volume or number of transactions. For example, a remote seller that is a wholesaler and only sells products for resale is not required to register.

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