



SOUTH DAKOTA V. WAYFAIR: WHAT'S NEXT IN NEVADA?

By Josh Hicks, Partner, McDonald Carano Law Firm

LAST MONTH, THE UNITED STATES SUPREME COURT ISSUED ITS

opinion in South Dakota v. Wayfair, Inc. The decision overruled a 1992 case affirming that a seller must have a physical presence in a state to be subject to taxation by that state.

Since 1992, states have tried a variety of approaches to capture sales tax from out of state sellers. Most of those approaches were either tied up with litigation, or of limited effect. Now, the Supreme Court has validated the legality of at least one approach to the imposition of a sales tax to an out of state seller.

The South Dakota approach requires out of state sellers to collect and remit sales tax on sales into South Dakota if the seller, on an annual basis, either delivers more than \$100,000 of goods or services into the state or engages in 200 or more transactions for the delivery of goods or services into the state.

Twenty-one other states have similar laws on the books or are considering similar laws.

Nevada took a different

approach than South Dakota. Nevada addressed e-commerce and out of state sellers in 2015 through Assembly Bill 380, a bill passed with bipartisan support.

That bill had three main components. First, an out of state seller is presumed to have nexus in Nevada if the seller has an affiliate with a physical presence in Nevada.

Second, an out of state seller is presumed to have nexus in Nevada if the seller has an agreement with a Nevada resident whereby the Nevada resident receives a commission or other consideration for referring customers to the seller.

Third, the Department of Taxation is required to notify the Legislature anytime the Department makes a finding or ruling, or otherwise enters into any agreement with an out of state seller providing that the seller or a seller's affiliate with a physical presence in Nevada is not subject to Nevada sales tax. The provisions of AB 380 remain law in Nevada today.

With the Wayfair decision now in place, it's safe to assume that every state with a sales

tax is considering how to implement a rule similar to South Dakota. The faster such rules are in place, the faster state coffers will see additional revenue. In Nevada, tax rules are codified in the state constitution, in statute and in regulation.

Amending the constitution is a time-intensive process, and regulations set forth rules "which effectuates or interprets law or policy . . ." Since Nevada law pertaining to out of state sellers is currently set forth in statute via Assembly Bill 380 (2015), a statutory change seems to be the most appropriate method to make any changes to that law. The Nevada Legislature convenes for its next regular session in February of 2019.

Should Nevada, and other states, begin the process of amending state laws to address out of state sellers similarly to South Dakota, a natural question is whether Wayfair will embolden states to go further than South Dakota.

For example, a state may seek to go lower than the annual \$100,000 in sales or 200 transactions thresholds used in South Dakota.



Josh Hicks, General Counsel for the Retail Association of Nevada

Some already have. At the far end of the spectrum, Oklahoma, Pennsylvania and Washington have a \$10,000 threshold with no minimum number of transactions. Whether those approaches can withstand a legal challenge remains an open question.

Aside from adjusting the thresholds for nexus, States may also seek collection by online marketplaces on behalf of sellers who may not individually meet the minimum sales numbers to trigger nexus. Further, states that seek to impose the sales tax on services adds an additional layer of complexity.

The simplest solution to a myriad of different state rules remains

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reforms, auto insurance and a couple on state and local business licensing.

Assumption alert: When a legislator experiences the frustrations that businesses do in setting up a business, then the requirements really get attention.

One bill that was fascinating was another run at prohibiting any person from requiring another person to undergo implantation of a microchip or other permanent identification marker.

Senator Harris carried a BDR on that subject in

the 2017 Session and there was a lot of ridicule.

The purpose was for identifications of victims of debilitating mental illnesses and those that can become lost as a result. It will be an interesting bill to follow and has multiple consequences for care givers and families alike.

As the process moves along RAN members will be kept informed about the growing list of bills that will be followed on their behalf, and as the legislature gets going the actual bills with links will appear on the RAN website. ■

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Moving forward you can expect several things from the newly formed restaurant council.

First, we'll convene four times per year—twice in the Reno area, and twice in the Las Vegas area. We'll also use an interactive system in both locations so you can attend all four sessions without the hassle of travel.

We'll also soon be employing professional and systemic polling or surveying system to understand what our members and non-members concerns might be. This information will be used as a starting point to enhance our understanding and drive the policy ambitions of the restaurant council forward.

The goal, of course, is to drive good policy forward and eliminate poor policies already on the books that drag down restaurant businesses.

To be successful, though, we need your help. This help can be in the form of poll/survey participation, pointing out your restaurant's challenges, participating

in the quarterly meetings and offering leadership to the council. After all, the restaurant council will only be successful if RAN represents all Nevada restaurants.

RAN will announce the first meeting date in early September. Watch this space and your email for announcements. ■

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with Congress. Federal legislation has been discussed for years on this issue but has not been passed.

One of the biggest obstacles to a federal solution has been political. A member of Congress who voted for legislation such as the Marketplace Fairness Act would be branded by political opponents supportive

of a tax on internet sales. Such attacks are politically effective but legally inaccurate — the sales were always subject to taxation, but collection from consumers was not realistic.

By affirming that states can in fact collect sales tax from out of state sellers, the Wayfair decision has eroded the political obstacle. Whether

Congress will now take action, or leave the matter to the various states, remains to be seen. ■

¹ 585 U.S. ____ (2018).

² *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

³ The states include Alabama, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky,

Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, Wisconsin and Wyoming.

⁴ To date, the Department has not made any such notifications.

⁵ NRS 233B.038(1)(a).