

2019 legislative changes: State tax matters

Understand critical legislative updates from 2019 affecting state and local tax planning and compliance. While every effort has been made to make this guide complete and accurate, it does not supersede any firm policies or procedures.

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FEDERAL LEGISLATION AFFECTING STATE AND LOCAL TAX (SALT)

Mobile employees

- Mobile Workforce State Income Tax Simplification Act of 2019 (S. 604)
 - The Mobile Workforce State Income Tax Simplification Act prohibits the wages earned by an employee who performs employment duties in more than one state from being subject to state income tax in a state other than the state of the employee's residence, unless the employee is in the state for more than 30 days during the calendar year the wages are earned. The bill also exempts employers from state income tax withholding and information reporting for employees performing employment duties in a state for fewer than 30 days.

Business activity tax

- The Business Activity Tax Simplification Act of 2019 (H.R. 3063)

- BATSA would require that out-of-state businesses have a physical presence in a state for more than 14 days to create nexus for income or other business activity tax purposes. These provisions would not apply to sales taxes.

SALES AND USE TAX

1. Wayfair: a year and a half later

On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair*, overturning the long-standing "physical presence" nexus standard established through *Quill v. North Dakota* in 1992. With the *Wayfair* decision, the Court has opened up the possibility for states to impose sales and use tax collection and remittance responsibilities on remote sellers based solely upon their economic presence in a state. The *Wayfair* litigation was settled shortly after our 2018 webcast, and the states responded quickly.

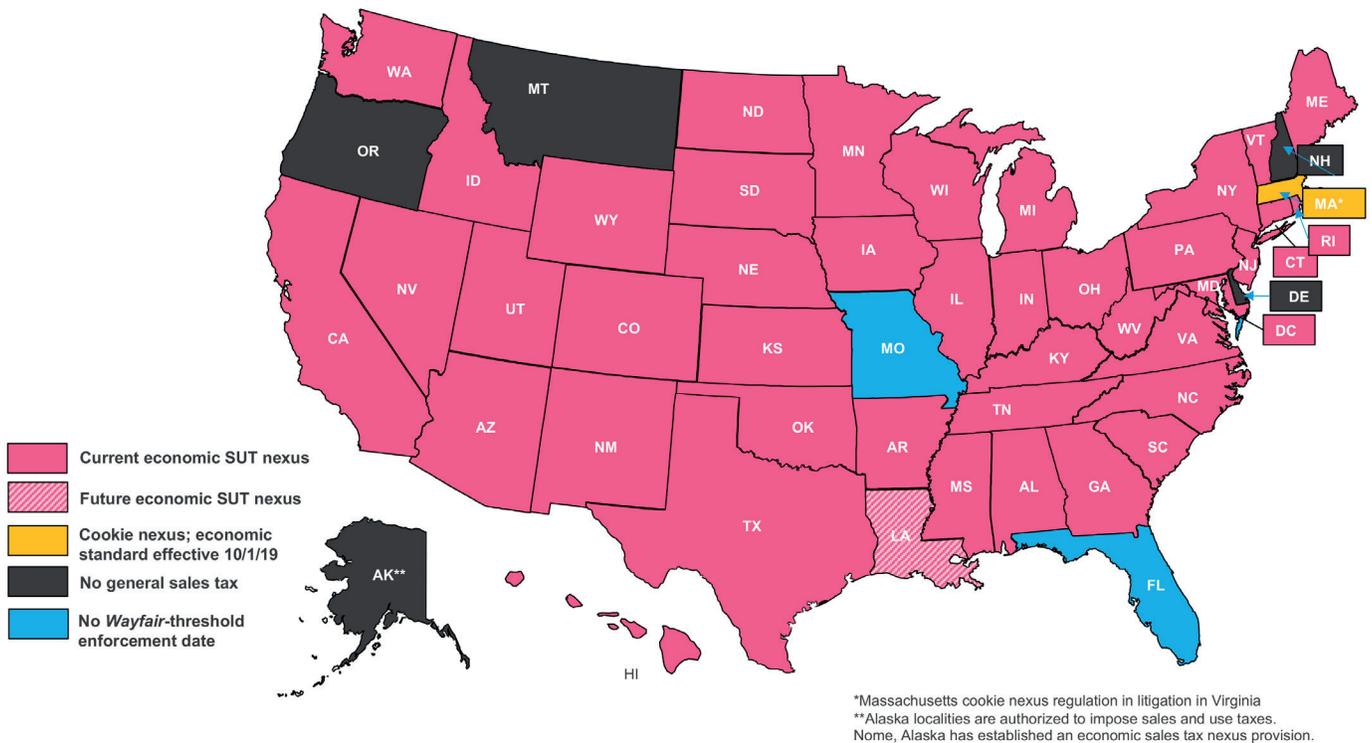
How does the economic sales tax nexus landscape look today?

The economic sales tax nexus landscape has settled quite a bit as we come up on 18 months from the *Wayfair* decision. Forty-four of the 46 state sales and use tax jurisdictions either enforce, or provided an enforcement date, for economic sales tax nexus. As of the date of this webcast, there are no pending enforcement provisions. Missouri and Florida are the only two states not to have provided enforcement through legislation or regulation. It is anticipated that both states will address economic sales tax nexus in the 2020 state legislative session.

Next steps in responding to Wayfair

1. Identify and quantify: Review and quantify where economic sales tax nexus has been established by considering the dollar amount and number of transactions made to each state, the effective dates of the nexus provisions, the taxability of the property or services sold, availability of exemptions and the tax rates of each jurisdiction.
2. Determine readiness: Evaluate processes and systems necessary to comply with U.S. state and local sales tax nexus provisions. Does the business have a technological solution or ERP available to help automate the tax collection and remittance process?

Economic sales and use tax nexus map as of Oct. 1, 2019.



3. Choose optimal path to compliance: Consider limiting exposure through tax planning and mitigation strategies, adopt reserves as necessary and maintain diligence of frequent changes in state nexus provisions.

Congress to the rescue?

At least three federal proposals have been introduced that could impact the state regulation of remote sales tax collection:

Name	Bill number	Description
Protecting Businesses from Burdensome Compliance Cost Act of 2019	H.R. 379	Requires certain administrative efficiency provisions and prohibits remote seller collection before Jan. 1, 2020
Stop Taxing Our Potential Act of 2019	S. 128	<i>Quill</i> Codification
Online Sales Simplicity and Small Business Relief Act of 2019	H.R. 1933 / S. 2350	Small seller exemptions; ban of retroactive collection; administration provisions

2. Expanded sales tax nexus: physical presence is not irrelevant

Taxpayers must remember that, even under the *Complete Auto* test, physical presence in a state will generally establish nexus for a remote business. Understanding the location of your inventory, sales force or other presence is still necessary in a post-*Wayfair* world. Concepts such as click-through nexus, affiliate nexus and use tax reporting continue to be enforced.

3. Marketplace facilitator nexus

By the date of this webcast, approximately 36 states have adopted “marketplace facilitator” nexus—a truly new frontier of nexus expansion. Marketplace facilitator nexus seeks to impose

the sales tax collection and reporting responsibilities onto the marketplace facilitators—those entities in a better position to collect. These laws have been adopted without much regulation and are broadly imposed, resulting in some businesses not realizing they are facilitators. Marketplaces can be online ecommerce sites, auction houses or even payment processors.

It is anticipated that the states will provide some clarification to these provisions over the next year, including better clarification of who is a facilitator, where the liability lies if the marketplace fails to collect, how sellers on the platform report sales, and whether sellers aggregate direct and marketplace sales to determine whether a threshold has been exceeded.

4. Other notable sales and use tax developments

State budget shortfalls have improved in the last year, although overall growth in state tax collection remains underwhelming. Additional sales and use tax revenues due to economic sales tax nexus provisions are helping boost budgets, but recent reports have suggested states overestimated the impact of the *South Dakota v. Wayfair* decision. States are also beginning to see the first year or so of positive impact resulting from federal tax reform, but are still responding to that legislation by adjusting their corporate income tax provisions.

Wayfair and marketplace facilitator nexus won the year, and very little other sales and use tax legislation was enacted. Base expansion legislation for services and software fell mostly flat—failing in over a dozen states, with only minor amendments made to existing digital goods provisions. Without the corresponding base expansion, very few new exemptions were enacted. There have been only two state-wide sales and use tax rate increases in the past couple of years: the District of Columbia increased its general rate from 5.75% to 6% effective

Oct. 1, 2018, and Utah increased its combined “common rate” from 5.95% to 6.1% effective April 1, 2019.

With the economic discussion focusing on a potential recession and the continued minor growth of overall state tax collections, it would not be unexpected for sales and use tax base expansion proposals to return in the 2020 state legislative sessions.

PRACTICE AND PROCEDURE

Amnesty

- Illinois Senate Bill 689
 - On June 5, 2019, Illinois authorized two tax amnesty programs, a general state tax amnesty program applicable to taxes administered by the Illinois Department of Revenue, and an amnesty program for the franchise tax and license fees administered by the Illinois Secretary of State. Both programs are scheduled to run from Oct. 1, 2019, through Nov. 15, 2019. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/illinois-tax-amnesty-programs-kick-off-on-oct-1-2019.html>

Statute of limitations

- Missouri Senate Bill 87
 - The sales and use tax refund statute of limitation is extended from three years to 10 years. This amendment is specifically for sales and use tax refunds and does not affect assessment periods. The statute of limitation for assessment periods remains three years.

INCOME AND FRANCHISE

In 2018, state conformity to federal tax reform occurred relatively quickly for those states with fixed-date conformity. While almost three dozen states addressed conformity in some measure, there were a few notable exceptions, including Arizona, California and Minnesota—three states that did not respond in 2019.

Through the second state legislative session since the enactment of federal tax reform, almost all states have responded conforming to at least some of the provisions of the federal changes. Below is a small sampling of legislative responses to tax reform:

Federal tax reform and the state response

- Arizona House Bill 2757
 - On May 31, Governor Doug Ducey signed House Bill 2757, updating the state's conformity to the Internal Revenue Code. The bill updates the state's conformity date to the version of the code in effect on Jan. 1, 2019. The bill also established new tax brackets beginning in 2019, increases the standard deduction and clarifies the amount of foreign dividend income that can be subtracted, among other changes.
- California Assembly Bill 91
 - On July 1, Governor Gavin Newsom signed Assembly Bill 91, addressing certain elements of the state's conformity with the TCJA. While the bill does not update the state's conformity date from Jan. 1, 2015, it addresses specific elements of the TCJA. The bill eliminates the state's NOL carryback provisions beginning in 2019, while not conforming to any of the NOL provisions addressed in the TCJA. The bill also conforms to the federal treatment of excess business losses under Section 461(l) beginning Jan. 1, 2019, as well as changes to ABL and 529 accounts and limitations on FDIC premium deductions by large financial institutions. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/california-enacts-budget-with-selective-conformity-to-the-tcja.html>
- Idaho House Bill 13
 - On Feb. 4, 2019, Governor Brad Little signed House Bill 13, updating the state's conformity to the Internal Revenue Code. The new provisions conform the state's code to the federal code as in effect Jan. 1, 2019.
- Kentucky House Bill 354
 - On March 26, Governor Matthew Bevin signed House Bill 354, revising the state's conformity to the Internal Revenue Code. The bill provides that Kentucky conforms to the code as in effect on Dec. 31, 2018, for tax years beginning on or after Jan 1, 2019, and for tax years beginning on or after Jan. 1, 2018, but before Jan. 1, 2019, the state conforms as of Dec. 31, 2017, including provisions of the TCJA that were in effect as of that date. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/kentucky-enacts-tax-reform-legislation-and-technical-changes.html>
- Massachusetts House Bill 4930
 - On Oct. 23, 2018, Governor Charlie Baker signed House Bill 4930, addressing the state's treatment of GILTI. The bill treats amounts included in federal income under Sections 951 and 951A as dividends received. Consequently, the income is eligible for Massachusetts' 95% dividends received deduction for corporate tax purposes. However, Massachusetts includes GILTI in income for individual taxpayers, and does not provide a dividends received deduction at the individual taxpayer level. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/massachusetts-enacts-legislation-to-treat-gilti-as-dividends-rec.html>
- Minnesota House File 5
 - On May 30, 2019, Minnesota Governor Tim Walz signed House File 5, updating the state's conformity to the Internal Revenue Code in response to the TCJA. Among other changes, the bill provides that the state generally does not conform to the foreign income inclusions in the TCJA, allowing a subtraction for GILTI income (after

the deduction under Section 250) and a subtraction for deferred foreign income included under Section 965. The bill also contains amendments to the individual income tax brackets, changes the standard deduction, and requires trusts and estates to add back any amounts deducted federally for qualified business income under Section 199A. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/minnesota-responds-to-the-tcja-with-special-session-tax-bill.html>

- New Mexico House Bill 6
 - On April 4, 2019, New Mexico enacted legislation providing for a deduction equal to the amount of GILTI included in federal taxable income under Section 951A, after allowing the deduction under Section 250. The deduction is available for tax years beginning on or after Jan. 1, 2020.
- New York Senate Bill 6615
 - On June 24, 2019, Governor Andrew Cuomo signed Senate Bill 6615, amending the state's treatment of global intangible low-taxed income (GILTI). The bill amends the state's definition of "exempt CFC income" to include 95% of GILTI included in federal income under Section 951A, without the deduction under Section 250. GILTI is also excluded from the investment income base and cannot constitute exempt unitary corporation dividends. However, these exclusions only apply to the extent the GILTI is derived from corporation with which the taxpayer does not file a combined report. The bill correspondingly disallows the 50% federal GILTI deduction under Section 250, and requires that 5% of GILTI be included in the denominator of the apportionment fraction. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/new-york-exempts-most-gilti-provides-remote-seller-changes.html>
- Tennessee Senate Bill 558
 - On May 8, 2019, Tennessee Governor Bill Lee signed Senate Bill 1028, amending the state's tax provisions related to GILTI and FDII. The bill adds new subtractions for amounts included in federal taxable income as global intangible low-taxed income under Section 951A and for amounts included as deferred foreign income under Section 965(a). Correspondingly, the bill requires additions equal to 5% of the amount included in FTI under Section 951A before the deduction in Section 20 and 5% of the amount included in FTI under Section 965(a) before the deduction in Section 965(c).
- Virginia Senate Bill 1372
 - On Feb. 15, 2019, Governor Ralph Northam signed Senate Bill 1372, updating the state's conformity to the Internal Revenue Code in response to the TCJA. The bill updated the state's conformity date to Dec. 31, 2018, and, among other changes:
 - decouples from the federal \$10,000 limitation on the deduction for state and local taxes paid,

- allows corporate taxpayers to subtract any GILTI income included in the federal base, and
- allows a deduction for 20% of disallowed business interest deductions under Section 163(j). Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/virginia-bill-updates-irc-conformity-and-addresses-federal-tax-r.html>

- West Virginia Senate Bill 268
 - On Feb. 27, 2019, Governor Jim Justice signed Senate Bill 268, providing that any amendment made to the Internal Revenue Code in 2018 applies for West Virginia purposes to the same extent as federally, whether the changes are retroactive or prospective. The change was effective Feb. 5.
- Wisconsin Senate Bill 883
 - On Dec. 14, 2018, Governor Scott Walker signed Senate Bill 883, providing for an elective entity level tax on pass-through entities intended as a workaround to the federal SALT deduction limitation. The bill provides an elective 7.9% tax on pass-through entities, requiring the consent of a majority of the entity's ownership. The bill seeks to mitigate the effect of the federal \$10,000 cap on the deduction for state and local taxes paid by individuals. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/wisconsin-enacts-salt-deduction-workaround-with-passthrough-tax.html>

Other notable non-sales and use tax developments

- Oregon House Bill 3427
 - On May 16, 2019, Oregon enacted a state-wide commercial activity tax on certain businesses with a sufficient level of commercial activity and nexus in Oregon. This is the first state gross receipts tax enacted since Nevada's Commerce Tax in 2014. The Oregon tax is effective Jan. 1, 2020. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/oregon-enacts-commercial-activity-tax-on-businesses.html> and <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/state-and-local-gross-receipts-taxes-a-new-trend-in-state-tax-la.html>.
- *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*
 - Issued on the one-year anniversary of the *Wayfair* decision, *Kaestner* asks whether an in-state beneficiary as a nonresident trust's only connection with a state is enough to satisfy the requirements of the Due Process Clause of the U.S. Constitution and allow North Carolina to tax all of the undistributed income of a non-grantor trust. The Court unanimously ruled that North Carolina could not tax the trust for three main reasons: 1) the beneficiaries did not receive any income from the trust in the years at issue, 2) the beneficiaries "had no right to demand trust income or otherwise control, possess or enjoy the trust assets"—the distribution of trust

assets was entirely in control of the trustee, and 3) there was no guarantee that trust income would ever be distributed to a resident beneficiary of North Carolina. Importantly, the Court noted its decision is limited to specific facts of the case. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/us-supreme-court-finds-in-state-beneficiary-inadequate-for-trust.html>.

Rate changes

- Arkansas Senate Bill 576
 - On April 9, 2019, Arkansas enacted a phased-in reduction of the top corporate tax rate from 6.5% to 5.9% as follows: beginning Jan. 1, 2021, the top rate is reduced to 6.2% on income exceeding \$100,000, with no change to the lower five tax brackets, and beginning Jan. 1, 2022, a reduction of the top rate to 5.9% on income exceeding \$25,000, and no change to the first three brackets, but an elimination of the "next \$75,000" bracket. Read more: <https://rsmus.com/what-we-do/services/tax/indirect-tax/sales-and-use-tax/arkansas-enacts-corporate-tax-changes-and-responds-to-Wayfair.html>.
- Connecticut House Bill 7424
 - On June 26, 2019, Connecticut enacted a new budget that extends the 10% surcharge on the corporation business tax, which was scheduled to expire in 2020. Read more: <https://rsmus.com/what-we-do/services/tax/connecticut-enacts-sweeping-tax-bill-for-2019-20-fiscal-year.html>

Nexus

- Hawaii Senate Bill 495
 - On July 2, 2019, Hawaii enacted an economic income tax nexus provision identical to the state's \$100,000 sales or 200 transaction economic sales tax nexus provision. The new nexus provisions are effective for tax years beginning after Dec. 31, 2019. Hawaii is the first state to enact an income tax nexus economic activity standard based on the *Wayfair* decision. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/hawaii-adopts-Wayfair-standard-for-income-tax-nexus-presumption.html>.
- Indiana Senate Bill 563
 - On May 1, 2019, Indiana enacted legislation that expanded the state's authority to impose its corporate income tax. The legislation provides that income derived from Indiana is taxable to the fullest extent permitted by the Constitution, regardless of whether the taxpayer has a physical presence in Indiana.

- Utah Senate Bill 28
 - On March 27, 2019, Utah enacted legislation amending the definition of doing business for purposes of the corporate income tax. The new definition includes selling or performing a service in the state and earning income from the use of intangible property in the state. However, the new definition does not include corporations whose only activity in Utah is protected under PL 86–272.

Allocation, apportionment and sourcing

- Arkansas Senate Bill 576
 - On April 9, 2019, Arkansas enacted single-sales factor apportionment for tax years beginning on or after Jan. 1, 2021. Arkansas currently uses a three-factor apportionment formula with a double-weighted sales factor. Read more: <https://rsmus.com/what-we-do/services/tax/indirect-tax/sales-and-use-tax/arkansas-enacts-corporate-tax-changes-and-responds-to-Wayfair.html>.
- Hawaii Senate Bill 394
 - On June 12, 2019, Hawaii enacted market-based sourcing for purposes of the Hawaii income tax applicable to tax years beginning after Dec. 31, 2019. Read more: <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/hawaii-enacts-market-based-sourcing.html>
- Indiana Senate Bill 563
 - On May 1, 2019, Indiana adopted market-based sourcing retroactively for tax years beginning after Dec. 31, 2018. Broadcasting and telecommunication services remain subject to the former cost-of-performance rules.
- New Mexico House Bill 6
 - On April 4, 2019, New Mexico adopted market-based sourcing for sales other than sales of tangible personal property effective for tax years beginning on or after Jan. 1, 2020.
- Vermont House Bill 514
 - On June 10, 2019, Vermont enacted legislation that will transition the state to market-based sourcing for corporate income tax sales factor purposes, effective for tax years beginning on or after Jan. 1, 2020.

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