

# The Wayfair Case: Sales and Use Tax for Non-Profits

- The first state to adopt an economic nexus statute was South Dakota in 2016. The law required a retailer without physical presence to collect sales tax if it had either :
  - \$100,000 in annual SD sales; or
  - at least 200 transactions for delivery into the state.
- In 2016, South Dakota sued retailers Wayfair Inc., Overstock.com, Inc. and Newegg Inc. to test the constitutionality of the new law.
- In 2018, the case reached the U.S. Supreme Court as South Dakota v. Wayfair, Inc., 138 S.Ct. 2080, 2099 (2018). The Court issued a decision on June 21, 2018.
- In a 5-4 decision, the Wayfair Court:
  - Overruled Quill and National Bellas Hess; and
  - Held that the “physical presence” test was an incorrect interpretation of the Commerce Clause.

# The Wayfair Case: Sales and Use Tax for Non-Profits

- Removes the Commerce Clause physical presence requirement for all direct taxes (including use tax obligations) as well as tax collection
  - Court confirmed the Complete Auto four part test applies to all state taxes
  - The Court reinterpreted the substantial nexus prong to make clear that physical presence is not required
- In abrogating the physical presence nexus rule, the Court created no new “bright line” test.
- Instead, the Court established a new “substantial nexus” test under the framework of Complete Auto.
  - A company has substantial nexus when it “avails itself of the substantial privilege of carrying on business in the jurisdiction.”
  - Substantial nexus may be established by sufficient “economic or virtual contacts” with a state.
- New standard applies to all types of state taxes but note that the application of the standard varies by type of state tax.

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- What are economic contacts?
  - Court indicated approval of SD statutory standards of \$100,000 in sales or 200 transactions as a sufficient “quantity of business” in the state.
  - Unclear if the level changes with the size of the state (per capita or market size) or the type of tax.
- What are virtual contacts?
  - Court gave no clear guidance, but referred to “instant access to most consumers through an internet-enabled device,” a “virtual showroom,” and a “continuous and pervasive virtual presence.”
  - MTC working group has seized upon this to attack P.L. 86-272 immunity from state income taxes.

# The Wayfair Case: Sales and Use Tax for Non-Profits

- Every state plus DC that levies a sales/use tax has now adopted economic nexus standards by statute or by rule.
  - Many have adopted South Dakota levels of \$100,000 or 200 transactions, but some have selected higher levels (e.g., CA, NY, and TX are at \$500,000).
  - 4 states started with higher thresholds (MA/TN - \$500,000; WA - \$267,000; AZ – phased in thresholds), but later reduced the thresholds to \$100,000
- The SSUTA member states committed to eliminating the transaction threshold over the course of 2023
- Not every state recognizes a tax exemption for either purchases or sales by Non-Profit organizations (following slides cover exemptions)

# State and Local Tax: Sales Tax Thresholds

State	Small Seller Threshold	Nexus Effective Date	Type of Receipts Counted	SSUTA Member
Alaska	\$100k and 100 Sales	5/1/2020	Gross	No
Alabama	\$250k	10/1/2018	Retail sales (taxable + nontaxable)	No
Arkansas	\$100k or 200 Sales	7/1/2019	Taxable Sales	Yes
Arizona	\$200k for 2019; \$150,000 for 2020; \$100,000 for 2021 & thereafter	10/1/2019	Gross retail sales or income	No
California	\$500k	4/1/2019	Gross receipts	No
Colorado	\$100k	6/1/2019	Gross Retail Sales	No
Connecticut	\$250k and 200 Sales \$100k and 200 Sales	12/1/2018 7/1/2019	Gross receipts	No
District of Columbia	\$100k or 200 Sales	1/1/2019	Gross receipts	No
Delaware	n/a			No
Florida	\$100k	7/1/2021	Taxable Sales	No
Georgia	\$250k or 200 Sales \$100k or 200 Sales	7/1/2019 1/1/2020	Gross retail sales	Yes

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# State and Local Tax: Sales Tax Thresholds

State	Small Seller Threshold	Nexus Effective Date	Type of Receipts Counted	SSUTA Member
Hawaii	\$100k or 200 Sales	7/1/2018	Gross income	No
Iowa	\$100k	1/1/2019 7/1/19	Gross revenue	No
Idaho	\$100k	6/1/2019	Gross receipts	Yes
Illinois	\$100k or 200 Sales	10/1/2018	Taxable Sales	No
Indiana	\$100k or 200 Sales* *Legislation pending to eliminate transaction threshold	10/1/2018	Gross revenue	Yes
Kansas	\$100k	7/1/2021	Gross revenue - Remote Sellers and MPS Taxable revenue - MPF	Yes
Kentucky	\$100k or 200 Sales	10/1/2018	Gross receipts	Yes
Louisiana	\$100k or 200 Sales	9/1/2020	Gross Receipts	No
Massachusetts	\$100k	10/1/2019	Gross receipts	No
Maryland	\$100k or 200 Sales	11/1/2018	Gross revenue	No
Maine	\$100k or 200 Sales \$100k	7/1/2018 1/1/2022	Gross revenue	No

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State	Small Seller Threshold	Nexus Effective Date	Type of Receipts Counted	SSUTA Member
Maine	\$100k	10/1/2019	Gross receipts	No
Minnesota	\$100k or 200 Sales	10/1/2018	Taxable sales	Yes
Missouri	\$100k	1/1/2023	Taxable Sales	No
Mississippi	\$250k Sales	9/1/2018	Sales into the state	No
Montana	n/a			No
North Carolina	\$100k or 200 Sales	11/1/2018	Gross sales	Yes
North Dakota	\$100k	11/1/2018	Taxable Sales	Yes
Nebraska	\$100k or 200 Sales	4/1/2019	Total retail sales	Yes
New Hampshire	n/a			No
New Jersey	\$100k or 200 Sales	11/1/2018	Gross revenue	Yes
New Mexico	\$100k	7/1/2019	Taxable receipts	No
Nevada	\$100k or 200 Sales	11/1/2018	Retail sales	Yes

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# State and Local Tax: Sales Tax Thresholds

State	Small Seller Threshold	Nexus Effective Date	Type of Receipts Counted	SSUTA Member
New York	\$500k and 100 Sales	6/21/2018	Gross receipts	No
Ohio	\$100k or 200 Sales	8/1/2019	Gross Retail Sales	Yes
Oklahoma	\$100k	11/1/2019	Taxable sales	Yes
Oregon	n/a			No
Pennsylvania	\$100k	7/1/2019	Gross sales	No
Puerto Rico	\$100k or 200 Sales	1/1/2021		No
Rhode Island	\$100k or 200 Sales	7/1/2019	Gross revenue	Yes
South Carolina	\$100k	11/1/2018	Gross sales	No
South Dakota	\$100k or 200 Sales \$100k	11/1/2018 7/1/2023	Gross revenue	Yes
Tennessee	\$500k \$100k	10/1/2019 10/1/2020	Gross Retail Sales	No
Texas	\$500k	10/1/2019	Total revenue	No
Utah	\$100k or 200 Sales	1/1/2019	Gross revenue	Yes

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State	Small Seller Threshold	Nexus Effective Date	Type of Receipts Counted	SSUTA Member
Virginia	\$100k or 200 Sales	7/1/2019	Gross Retail Sales	No
Vermont	\$100k or 200 Sales	7/1/2018	Gross Sales	Yes
Washington	\$100k or 200 Sales \$100k	10/1/2018 01/01/2020	Gross retail sales (2018-2019) Gross Income from all activities subject to WA Excise not limited to receipts from sales (2020 forward)	Yes
Wisconsin	\$100k or 200 Sales \$100k	10/1/2018 2/20/2021	Gross Sales	Yes
West Virginia	\$100k or 200 Sales	1/1/2019	Gross sales	Yes
Wyoming	\$100k or 200 Sales	2/1/2019	Gross revenue	Yes

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# State and Local Tax: Gross Receipts Taxes

State	Tax Type	Nexus Threshold	Tax Rate	Exemption for Non-Profits
California	Income Tax with PL 86-272 exposure	\$690,144 in 2022 - amount is set in August every year	S-Corp: 1.5% Corporations: 8.84%	Yes, but UBI Taxable
Massachusetts	Income Tax and Net Worth Tax with PL 86-272 exposure	\$500,000 in a taxable year	9.50%	Yes on Income Tax, but UBI Taxable
Nevada	Gross Receipts Tax	\$4,000,000 in Nevada Gross Revenue in a taxable year	Between 0.058%-0.281%, depending on NAICS code	Yes
New York	Income Tax with PL 86-272 exposure	\$1,138,000 in gross receipts in New York or sum number of customers plus locations covered by contracts > 1000	Under \$5 million receipts: 6.5% Over \$5 million receipts: 7.25%	Yes, but UBI Taxable
Ohio <sup>^</sup>	Gross Receipts Tax	\$500,000 in Ohio Gross Receipts	0.26%	Yes
Oregon <sup>^</sup>	Gross Receipts Tax	\$1,000,000 in gross receipts subject to OR CAT	\$250 plus 0.57%	Yes, if organized under IRC § 501(c)-(f), (j), (n); § 521, or § 529
Tennessee	Gross Receipts Tax, and Franchise Tax	\$500,000 in Tennessee Sales	0.25%	Exemption limited to services provided by charitable organization (not defined); likely does not include retail/gift shop sales
Texas <sup>^</sup>	Gross Receipts Tax	\$500,000 in Texas gross sales; but no taxes due if revenue less than \$1,230,000	0.38%	Only if certified as exempt by the Texas Comptroller; If certified, exempt on all income, including UBI
Washington	Gross Receipts Tax	\$100,000 in receipts current or past year	0.47%	No

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# Taxability of Sales To or By Non-Profits

State	Sales by Non-Profits	Sales to Non-Profits
Alabama	Limited Exemption, for sales by public hospital associations or nonprofit membership associations (if 1+ members are county hospital associations) Ala. Code s. 40-23-5(m)	Limited Exemption, to public hospital associations or nonprofit membership associations (if 1+ members are county hospital associations), and sales to public and private educational institutions. Ala. Code s. 40-23-4(a)(15), 40-23-5(m)
Alaska	Varies by municipality	Varies by municipality
Arizona	Yes, if the non-profit is recognized as a non-profit by the IRS or AZ DOR, including registration as a 501c3 or 501c6. Ariz. Rev. Stat 42-5061.A.4	Generally no, unless the purchaser is granted an organization-specific exemption by the state.
Arkansas	Yes. Ark. Code s. 26-52-401(2)	No
California	Limited, not applicable exemptions	Limited exemptions for statutorily identified organization. Cal. Rev. & Tax Code § 6365.
Colorado	Yes, to the extent not otherwise exempt under title 39, article 26, if the taxable proceeds in the prior calendar year do not exceed \$45k.	Yes. Sales to non-profit and educational organizations are broadly exempt. Colo. Rev. Stat. s. 39-26-718(1)(a)
Connecticut	Generally, taxable.	Exempt, subject to limitations. Conn. G. Stat. § 12-412.
D.C.	Generally, taxable.	Exempt, subject to limitations. D.C. Code § 47-2005
Florida	Generally, taxable.	Exempt, subject to limitations. Fla. Stat. § 212.08.
Georgia	Generally, taxable.	Limited exemption to statutorily identified organizations.

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# Taxability of Sales To or By Non-Profits

State	Sales by Non-Profits	Sales to Non-Profits
Hawaii	Sales by organizations operated exclusively for charitable, scientific, or educational purposes are exempt, though the organization must register with the HI Dept Tax, and must provide a copy of the organizations federal exempt status. Haw Rev Stat Sec. 237-23(a)(4)	Generally taxable, with limited exceptions. Haw. Rev. Stat. § 237-23(a); Tax Facts 98-3 (revised Mar, 2020)
Idaho	Generally, taxable.	Generally taxable, with limited exceptions. Ida. Rule 35.01.02.085.01
Illinois	Generally, taxable.	Exempt, subject to limitations. The organization must have an active exemption identification number issued by the Department of Revenue. 35 ILCS 120/1g.
Indiana	Sales by qualified nonprofit organizations are exempt so long as the organization's IN sales do not exceed \$100,000 in the current or previous calendar year, but must treat all sales as taxable once the threshold is exceeded. Ind. Dept. Rev., Information Bulletin #10. Certain types of religious organizations are excluded from the \$100,000 such that all of their sales are exempt regardless of revenue level.	Sales to charitable, scientific, literary, or educational, non-profit organizations are exempt. Sales to hospitals are exempt. Ind. Dept. Rev., Information Bulletin #10.
Iowa	Generally, taxable.	Exempt, with exceptions. Iowa Code § 423.3.78; Rule 701 17.1. Limited exemption for sales by 501(c)(3) orgs where activity from which proceeds derived are educational, religious, charitable activities; and entire proceeds of sales are expended for educational, religious, or charitable purposes. But see <i>Hope Evangelical Lutheran Church v. Iowa Department of Revenue and Finance</i> , 463 N.W.2d 76 (Iowa 1990); Policy Letter 01300107.
Kansas	Generally, taxable. Nonprofit corporations, businesses, organizations, and associations regularly engaged in the business of selling tangible personal property at retail or furnishing services or entertainment to the ultimate user or consumer and not for resale are retailers liable for sales tax. However, Fees for seminars, trainings, and workshops provided by a non-profit in an educational setting are not taxable. Kan. Dept. Rev. Publication 1560.	Taxable. (K.A.R. 92-19-67(a)).

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Kentucky	Generally, taxable. Exception limited to sales by resident nonprofit (or resident SMLLC subsidiary of nonprofit institution); sales by school bookstores of books and course materials; or sales by non-profit, school-sponsored clubs and organizations.	Exempt, with exceptions. Ky. Rev. Stat. § 139.495.
Louisiana	Generally, taxable. Nonprofit organizations are subject to sales tax on sales made by them in connection with regularly conducted activities that compete with other businesses.	Taxable. La. Rev. Stat. § 47:305.13-14, .18. Sales of textbooks and course-related software to post-secondary academic degree-granting institutions are exempt. Sales of bibles, songbooks, and literature to churches and synagogues are exempt.
Maine	Generally, taxable.	Generally taxable, with limited exemptions. 36 Me. Rev. Stat. § 1760
Maryland	Generally, taxable. Sales made by a religious organization or other nonprofit organization exempt under IRC 501(c)(3) are exempt if the proceeds are used to carry on the exempt purposes of the organization, and then only the part of the sale price that qualifies for a federal income tax deduction as a charitable contribution is exempt.	Exempt, with exceptions. Md. Tax. Gen. Artl § 11-204(b); Reg. 03.06.01.22.C.
Massachusetts	Generally, taxable.	Exempt, subject to 3 conditions: property must be used in the conduct of the organization's enterprise; organization must have a certificate of exemption from the DOR; and vendor must maintain records of each sale. M.G.L. c. 64H, § 6(e).

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# Taxability of Sales To or By Non-Profits

State	Sales by Non-Profits	Sales to Non-Profits
Michigan	Generally, taxable. Nonprofit entities engaged in retail sales activity of any kind must be licensed and collect applicable taxes.	Taxable. Mich. R. 204.140(5); R.205.65. Sales to regularly organized houses of worship may be exempt. Sales to religious organizations and societies composed of church members are taxable.
Minnesota	Generally, taxable.	Taxable. Minn. Stat. § 297A.67; Rule 8131.6200.9; Rule 8130.6700.
Mississippi	Generally, taxable.	Exempt.
Missouri	Sales made by or to religious and charitable organizations in their religious, charitable, or educational functions and activities are exempt from sales and use taxes. RSMo. Sec. 144.030(19), (20) ; 12 CSR 10-110.955	Exempt. Mo. Rev. Stat. § 144.030 (19)-(20).
Montana	n/a	n/a
Nebraska	Generally, taxable.  Sales by an organization created exclusively for religious purposes are exempt if 3 conditions were met: the sale occurred during an activity conducted by the organization; the organization only sells property it owns during one such activity per year; and the activity does not last longer than 3 consecutive days.	Generally taxable, with limited exemptions. Sales to an organization created exclusively for religious purposes are exempt; sales to certain categories of organizations providing public health services are exempt.

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State	Sales by Non-Profits	Sales to Non-Profits
Nevada	Sales by organizations operated exclusively for charitable, scientific, or educational purposes are exempt, though the organization must register with the NV Dept Commerce. Nev. Code Sec. 372.326	Exempt. Nev. Stat. 372.343. Nonprofit organization created for religious, charitable, or educational purposes must apply and demonstrate how NV citizens benefit from organization.
New Hampshire	n/a	
New Jersey	Exempt. NJ Stat. sec. 54:32B-9(b)	Generally taxable with limited exemptions. N.J. Admin. Code 18:24-9.11.
New Mexico	Sales by entities exempt from federal income tax under IRC 501c3 are exempt. NM Stat Ann Sec. 7-9-29	Exempt, if the organization uses the property in functions that qualify for the federal exemption, and so long as it presents a NM issued Non-Taxable Transaction Certificate. N.M. Stat. Ann. § 7-9-60.
New York	Sales by entities exempt from federal income tax under IRC 501c3 are exempt. N.Y. Tax Law Sec. 1116(a)(4). However, tangible property sold at retail in a shop or store operated by a non-profit is taxable. N.Y. Tax. Law Sec. 1116(b)(1).	Generally taxable, subject to limited exemptions. N.Y. Tax Law § 1116(a).
North Carolina	Generally, taxable.	Taxable. N.C. Dept. Rev. Important Notice: Retail Sales by Certain Nonprofits.
North Dakota	Generally, taxable.	Taxable. N.D. Code § 57-39.2-02.1

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Ohio	Generally, taxable.	Exempt, subject to limitations. Ohio Rev. Code § 5739.02
Oklahoma	Sales by entities exempt from federal income tax under IRC 501c3 are exempt. 68 O.S. Sec. 1356(75)	Exempt, with limitations.
Oregon	n/a	
Pennsylvania	Exempt.	Generally taxable, subject to limited exemptions. Pa. Const. Art. VIII, § 2(a)(v); 72 P.S. § 7204
Rhode Island	Generally, taxable.	Generally taxable, subject to limited exemptions. RI Gen Laws Sec. 44-18-30(5).
South Carolina	Sales by charitable, non-profit, or educational institutions are exempt. S.C. Code Sec. 12-36-2120(41)	Generally taxable, subject to limited exemptions. S.C. Code § 12-36-2120(41); S.C. Rev. Rule 09-8.
South Dakota	Generally, taxable.	Generally taxable, subject to limited exemptions. S.D. Code § 10-45-10; S.D. Admin. Rules 64:06:01:21.
Tennessee	Generally, taxable.	Exempt. Tenn. Code Ann. § 67-6-322.
Texas	Generally, taxable.	Exempt, subject to strict limitations. Tex. Tax Code § 151.310; Tex. Admin Code tit. 34, Rule 3.322.
Utah	Sales made to or by religious or charitable institutions in the conduct of their "regular religious or charitable functions and activities" are exempt from tax. Utah Code Sec. 59-12-104(8).	Exempt only where substantially related to the organization's exempt purpose. Utah Code Ann. § 59-12-104.
Vermont	Sales to or by a school or an organization exempt under IRC 501c3 are exempt from sales tax. 32 V.S.A. Sec. 9743(3).	Generally taxable, with limited exemptions and only where the organization holds an exemption certificate issued by VT Tax Commissioner. 32 V.S.A. § 9743. Vt. Dept. Tax. FS-1115

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State	Sales by Non-Profits	Sales to Non-Profits
Virginia	Nonprofit entities that are exempt from paying sales and use tax under Sec. 58.1-609.11 are also exempt from collecting sales and use tax, if the entity is within the same class of organization of any entity that was exempt from collecting tax on June 20, 2003. Va Code Sec. 58.1-609.11.F.	Taxable. Va. Code § 58.1-609.10(8).
Washington	Generally, taxable. Sales by a nonprofit organization at occasional fundraising sales may be exempt if all of the proceeds go to the exempt organization. Wash. Rev. Code 82.08.02573; 82.04.3651; Wash. Admin. Code 458-20-169. Fundraising does not include the operation of a regular place of business in which sales are made during regular hours.	RCW 82.56.010; RCW 82.08.050(7). Limited exemptions available, and only if non-profit purchaser provides an exemption certificate within 90 days of the sale.
West Virginia	Generally, taxable. A church that has a current registration certificate and that is exempt from federal income taxes may make exempt sales at fundraisers sponsored by the church if a fundraiser lasts no more than 84 consecutive hours and is held no more than six times during any 12-month period.	W.Va. Code 11-15-9(a)(2),(14)..
Wisconsin	Generally, taxable. Wis. Stat. § 77.52(7); Rule 11.35. A nonprofit that is engaged in a trade or business of selling must obtain a seller's permit and pay sales tax on all taxable gross receipts	Exempt, where the sale is to an organization that is exempt from federal income tax or a religious organization that would qualify under IRC §501(c) even if not officially federally exempt. Wis. Stat. § 77.52(7); Rule 11.35..
Wyoming	Generally, taxable.	Generally taxable, subject to limited exemptions, and only where the organization secures approval in writing of the Wy. DOR. Wy. Stat. § 39-15-105.

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