

Blog Post

New Hampshire Passes Anti-Wayfair Remote Tax Legislation

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Most states impose sales or use tax on tangible personal property sold or consumed in the state. However, five states – Alaska, Delaware Montana, New Hampshire, and Oregon – do not impose such a tax. In its landmark *South Dakota v.*

Wayfair decision, the U.S. Supreme Court ruled that out-of-state sellers can be required to collect and remit tax on sales into another state in which the seller had no physical presence. The response from New Hampshire was swift and to the point.

Governor Chris Sununu immediately tweeted that the Court’s ruling was “outrageous” and that “if they think we are just going to take this without a fight, well then they have another thing coming.”

There are at least two anti- *Wayfair* arguments raised by “no tax” states such as New Hampshire. First, businesses located in these states are not equipped to handle the cost and complexity of collecting and remitting sales tax to other jurisdictions. In addition, the holding in *Wayfair* provides a disincentive for businesses to open and settle in “no tax” states.

New Hampshire, for its part, has been very aggressive in condemning the *Wayfair* decision. A continuous stream of New Hampshire politicians have made public statements through press releases, social media posts, and radio and television interviews denouncing the impact of

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the *Wayfair* ruling. The Governor quickly set up a hotline for local businesses offering assistance in the event they receive a sales tax bill from a foreign taxing jurisdiction. Yet, the wheels of government move slowly – even in the Granite State. Numerous legislative fixes were proposed and defeated in the New Hampshire legislature. However, on July 19, 2018 the Governor signed into law what has been named the “Wayfair Bill.”

The stated purpose of the law is to ensure that no foreign taxing jurisdiction imposes sales tax collection obligations on a New Hampshire remote seller in a manner that violates the United States or New Hampshire Constitutions. It also intended to protect the private and personal information that New Hampshire sellers receive from their consumers from inappropriate disclosure to foreign taxing jurisdictions.

Under the new law, a foreign taxing jurisdiction seeking to audit or impose sales tax collection obligations on a New Hampshire business must notify the New Hampshire Department of Justice at least 45 days in advance. The New Hampshire Department of Justice will determine whether the laws of the foreign taxing jurisdiction meet the requirements of the United States and New Hampshire Constitutions. If the laws of the foreign taxing jurisdiction are found to be unconstitutional, the New Hampshire Department of Justice is empowered to file a lawsuit to challenge the law. If a New Hampshire business is required to collect and remit tax to a foreign taxing jurisdiction, the new law permits the business to deduct its reasonable compliance costs. Additionally, in the event that a foreign taxing authority requests private customer transaction information from a New Hampshire business, the new law requests that the business notify the New Hampshire Department of Justice. The “Wayfair Bill” also gives the New Hampshire Department of Justice the authority to bring declaratory judgment actions against foreign taxing

jurisdictions and use subpoena powers to enforce the laws of the state.

Foreign taxing jurisdictions are unlikely to take this lying down. For example, the new law allows New Hampshire businesses to deduct reasonable compliance costs from the sales taxes to be remitted to foreign tax jurisdictions. Sales taxes are considered “trust fund” taxes by state taxing authorities. Once collected, sales taxes are the property of the state. Failure to remit any portion of the amounts collected as sales taxes can bring substantial civil and criminal penalties. While it is unclear if any New Hampshire businesses will attempt to deduct their compliance costs, the decision to do so will almost certainly cause headaches for such businesses down the road. Arguably, the more interesting question is what happens if foreign taxing jurisdictions do not challenge the cross-border implications of the newly-enacted law? Will other “no tax” states follow New Hampshire’s lead? Stay tuned as the first sales tax reporting period following the enactment of the “Wayfair Bill” is quickly coming to a close.

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