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Determining nexus

- Nexus-creating activities
- Difference between origin-based and destination-based states
- When to review nexus activities
- How to create a nexus checklist

How to Determine Sales Tax Nexus

Discover why other states want you to collect sales tax

Nexus is a pretty simple concept. Nexus is having enough presence in a state that a business needs to collect sales tax in that state. Applying and understanding where a business has nexus is not.

Determining where a business is on the hook to collect and remit sales tax begins with knowing nexus.

Most states make their own rules and define nexus differently. Adding to the challenge of determining nexus is how quickly many states are changing their rules and how broadly the rules are being applied.

While we can't change the rules, we can help you know which ones apply to a business with these Frequently Asked Questions.

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Frequently Asked Questions

What is nexus?

Nexus is a connection or link between a taxing authority and a business. It is the minimal activity allowed by the US Constitution that allows a state to assert taxing authority over an out-of-state entity.

As of June 21, 2018, when the U.S. Supreme Court ruled on *Wayfair v. South Dakota*, there have been changes to what states consider nexus. This leaves us with both old standards and new being rolled out by jurisdiction at an aggressive pace.

What is required before taxing jurisdictions can impose taxes?

Having nexus allows the state to compel out-of-state companies to register and collect sales and use taxes as well as file and pay income, franchise, gross receipt or business and occupation-based taxes. Businesses with nexus do the state a favor, collecting money to put into state coffers. This creates an incentive for states to exert nexus over as many businesses as they can.

From a statutory perspective, most states define nexus as "maintaining, occupying, or using permanently or temporarily, directly or indirectly or through a subsidiary, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business." Also, "having a representative, agent, salesman, canvasser, or solicitor operating in the state under the authority of the retailer or its subsidiary on a temporary or permanent basis," can trigger nexus in a state.

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Frequently Asked Questions

Why Wayfair changes remote seller requirements?

The sales and use tax world as we knew it was irretrievably changed with the U.S. Supreme Court decision in *Wayfair v. South Dakota*. In its wake, states are rapidly tweaking their definitions to expand nexus to as many businesses as they can, leaving those businesses scrambling to catch up.

What you knew about nexus in a certain location yesterday may be altered today. With no universal rollout in expanded sales and use requirements, every state is coming up with slightly different definitions of sales tax nexus, and many of those are in flux.

Whether you are new to collecting sales tax or expanding your company's e-sales operations, learning the ins and outs of tackling sales tax upfront can help you avoid errors that can trip you up.

What business activities trigger remote seller nexus?

If you have a physical store, it is easy to determine nexus. Where it gets dicey is if a business doesn't have a storefront, but has business activities in a state that would trigger nexus, and thus require sales tax registration and collection requirements? This is the issue facing remote sellers, who following the Wayfair decision can no longer rely on not having a physical presence as keeping them from registering and collecting sales taxes.

Traditional and expanding nexus-creating activities in a state may include the activities of:

Independent agents	Remote sales force (captive or third party)	Affiliate nexus	Trade show participation	Leased or owned properties
Contract labor in the state	Company representatives	Traveling sales people	Multi-state locations	Drop shipments
Contractors	Commissioned resellers	Own or lease real or personal property	Marketing and online promotions	And the list grows…

What Constitutional limitations are in place on states?

For nexus based on the due process clause and the commerce clause. The due process clause states you must have a minimum connection and there must be a rationale relationship between the income attributed to the state and its enterprise. The commerce clause prevents states from imposing laws that restrict interstate commerce.

Frequently Asked Questions

What is economic threshold nexus?

Times have changed and so too have the rules. Previously, states were bound to a nexus standard that called for an out-of-state company to have “physical presence” prior to requiring them to collect on behalf of constituents. This standard is expanded in the wake of the *South Dakota v. Wayfair* decision.

The *Wayfair* decision changes the landscape of what is required from sales tax collection process by overturning previous restrictions on nexus; in this instance sales of $100,000 or 200 transactions.

What do businesses need to know about click-through nexus?

Click-through provisions, also known as “Amazon Laws,” are yet another way for states to consider a remote seller to have nexus. Argued in the New York Supreme Court, click-through nexus happens when a buyer clicks on an item online and is filtered through to another website to buy the product.

The owner of the link that receives a commission on that purchase has performed a nexus-creating activity for the seller, who is subject to sales tax requirements. This typically requires a minimum threshold of sales, like $10,000 per annum. For example, a blogger provides a link to a product being sold, the blogger received a commission whenever the product is purchased through that link, if sales thresholds are met, the seller of the product is deemed to have click through nexus wherever the blogger is sitused.

What is affiliate and agency nexus?

Affiliates involves a connection between in-state and remote retailers, such as Gap stores and gap.com or Home Depot and homedepot.com, whether the entities are separate legal entities, they sell substantially similar product lines, there are considered to have reciprocal nexus and need to collect sales tax wherever each other is located.

Agency nexus involves third party independent contractors making a market on your behalf, their activity and in-state presence create nexus for sales and use taxes.

As *Wayfair* rules become more prominent, some of these nexus requirements become somewhat antiquated, because now a mere sales threshold is enough without a physical presence to create nexus and thus, a sale and use tax collection responsibility.

Frequently Asked Questions

What are “marketplace” facilitator” rules?

A marketplace facilitator facilitates the sale of a product into a marketplace for payment, bringing buying and seller together, and processing fulfillment. These market creators collect on behalf of the state on behalf of all sales they make they include players such as eBay, Etsy, and the Amazon Marketplace.

Each state marketplace law is unique. Be aware:

- The sales tax onus is moving to the seller
- Most states also impose notice and reporting requirements on non-collecting sellers to encourage out-of-state sellers to collect and remit sales tax
- Most states with these laws hold the facilitator liable, but not all

What reporting rules may apply?

If you don’t have nexus, “rat-out” provisions may still apply to your business. Litigated in Colorado (*Direct Marketing Association v. Brohl)* all the way up to the US Supreme Court, the rules say if you don’t have nexus or are licensed to collect sales and use taxes, but exceed certain economic thresholds, there are reporting rules to comply with. Non-collecting retailers must:

- Provide notice that use tax is due on purchases by their customers on each invoice or order document.
- Provide annual summaries of customer purchases to in-state purchasers.

File customer information reports with the various State Departments of Revenue.

What resources can I turn to for determining current nexus rules?

In addition to your tax advisor, Avalara regularly updates their nexus snapshot of states with various nexus standards. See a current map of nexus laws at: Avalara or https://www.avalara.com/us/en/learn/nexus.html.

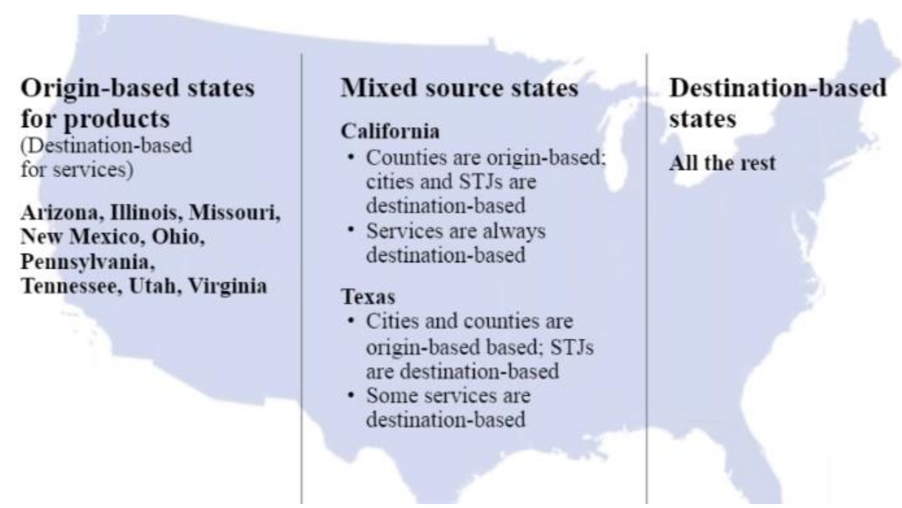
Frequently Asked Questions

How does sourcing (or Situs) play a role in nexus?

This is where origination vs. destination sourcing comes into play. To determine where the sale occurs or where the sale ends up, states generally use two sourcing methods.

- **Origin-based** tax-rate sourcing provisions set tax rates based on where the product or service originates from. The set tax rate charged for sales into the state is dependent upon whether a company has nexus in the state based on locations or nexus-creating activities. In general, sourcing provisions apply when a seller: has locations or sells over the counter in the state; takes orders in the state; passes title to items sold in the state; or has outside sales people in the state. Analysis of origin-based sourcing is highly fact-sensitive and closely correlates with analysis of why a company has sales tax nexus in the first place. In 2007, the Streamlined Sales and Use Tax Agreement allowed use of origin-based sourcing provisions. Sellers with in-state locations are subject to local tax rates; remote sellers are subject to rates where product is shipped from.
- **Destination-based** tax-rate sourcing provisions kick in where a product is delivered. Once a seller establishes sales tax nexus in a destination state, modifications in the company's ins-state activities will generally not affect the determination of what sales tax rate to charge on your sales in the state. They are based on the ship to location.

In determining sourcing requirements, understand how transactions work within a company and how sales are fulfilled (third party, warehouse, drop shipment, resale). See the map for a breakdown on sourcing requirements as of October 30, 2018.



Frequently Asked Questions

What should my tax advisor be reviewing on my behalf to determine nexus?

Determining nexus requires an extensive review of business operations and activities. Here's a nexus checklist to get you started.

- Document nature of business
- Look at sales by state
- Know where payroll, property and inventory are located
- Understand marketing and sales activities
- Understand third party activities (fulfillment, sales, advertising, marketing, agents)
- Google "nexus" questionnaires for lists of questions to consider
- Compare where activities are taking place
- Track changes in law
- Incorporate changes in corporate structure and mergers and acquisitions
- Incorporate employee, product and service additions
- Understand how items are sold
- Training and warranties handling

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Meredith Smith combines technical knowledge with an in-depth industry understanding of state and local tax (SALT) issues to expertly manage the complicated web of tax laws governing SALT issues. She performs nexus reviews, exposure studies, and tax planning in support of the strategic goals of dynamic businesses.