

Small Business Notes

VOLUME 32, No. 6

JULY 2018

Minnesota Department of Employment
and Economic Development (DEED)

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U.S. Supreme Court Rules Against Physical Presence Nexus But Allows “Economic Nexus” for Collection of State Sales Tax by Online Sellers

On June 21st the U.S. Supreme Court handed down its decision in *South Dakota v. Wayfair, Inc.* (See the earlier discussion of the facts of the case in SMALL BUSINESS NOTES for January, 2018.)

Until this case the standard for nexus adequate to support a requirement of sales tax collection was the standard of “physical presence” in the state as that standard was articulated in the Court’s decision in *Quill v. North Dakota*, 504 U.S. 298 (1992). At issue here was the replacement of that physical presence standard by South Dakota with an economic nexus standard that required sales tax collection by any retailer – regardless of location and including online and other forms of electronic sales – to collect and remit sales tax to the state. That standard was more than \$100,000 in volume of revenue or more than 200 transactions annually.

The Court first addressed the earlier physical presence test finding it “flawed on its own terms” in three ways:

- That physical presence is not a necessary interpretation of the Commerce Clause nexus requirement;
- That it puts businesses with a physical presence at a competitive disadvantage;
- That it treats economically identical businesses differently based only on location.

The Court then held that the new standard of \$100,000 in business or more than 200 transactions annually was an acceptable standard because it is “a considerable amount of business.” In short the decision makes the South Dakota standard a *de facto* safe harbor for online sales.

It is important to remember that the Court, in its *Quill* decision invited the Congress to address the nexus issue via legislation which the Congress has not done. Absent that action, the fate of other state collection efforts such as click-through statutes or statutes requiring sellers to identify buyers who can be approached by the state for collection of sales taxes will no doubt generate more controversy.

Minnesota Department of Transportation (MnDOT) Seeks Comment on Proposed Goals for Disadvantaged Businesses

The Minnesota State Register for Monday, July 16, 2018 (43 SR 42) contains a request for comment on MnDOT's proposed statewide goals for Disadvantaged Business Enterprise participation in highway and transit contracts for fiscal years 2019-2021. The request notes that MnDOT is committed to increasing disadvantaged business capacity, providing technical resources to assist businesses to compete for MnDOT contracts, and creating opportunities for disadvantaged business participation through right-sized contracts.

The Federal Highway Administration and the Federal Transit Administration require MnDOT to set statewide goals for disadvantaged business participation in federally funded projects. The proposed goal for Federal Highway Administration funded projects is 12.23 percent, for Federal Transit Administration funded projects it is 9.12 percent.

The proposed are available for public inspection July 3 through July 31, from 8 AM to 4:30 PM. At the Minnesota Department of Transportation, 395 John Ireland Blvd., Saint Paul. Comments will be accepted until 4:30 PM, July 31, 2018.

MnDOT had scheduled four public meetings on the proposed goals. Three of these meetings (in Rochester, Minneapolis, and Duluth) had already taken place before the notice appeared in the State Register. A fourth meeting was scheduled for July 23 in St. Paul. Interested and affected parties who were unaware of the meetings are advised to inspect the goals at the Minnesota Department of Transportation, 395 John Ireland Blvd., St. Paul before the July 31 deadline.

U.S. Department of Labor Issues Regulation Amendments to Increase Employers' Ability to Offer Health Coverage to Employees

On June 19 the U.S. Department of Labor (DOL) released final regulations amending Association Health Plan (AHP) under 29 CFR Part 2510.3-3 (Employee Benefits). Under the amendments, small employers will be able to join together to offer health coverage and take advantage of cost efficiencies offered by large group enrollments.

Employers desiring to form an AHP must all be engaged in either the same trade, industry or line of business, or have a principal place of business in the same region that does not go beyond the boundaries of a single state or metropolitan area (a "commonality of interest test"). In addition the AHP must have at least one business purpose unrelated to offering of group coverage (e.g., industry marketing or promotion) even if the primary purpose is the offering of insurance coverage.

The AHP must be controlled by its employer members as evidenced by (1) whether employer members regularly nominate and elect directors and officers of the AHP and (2) whether employer members have authority to remove directors or officers for cause and (3) whether employer members have authority and opportunity to approve or veto decisions or activities that relate to the formation and operation of the plan. Concern for the potential burdens on small businesses led the DOL to be clear in the amended regulations that the AHP members are not required to manage the day-to-day operations of the plan.

The final amended rule identifies "eligible participants" in an AHP as employees of a current AHP member; former employees who were entitled to coverage under a group or association health plan in place when the employee was an employee of the member; beneficiaries of such employees—that is, spouses and children. "Working owners" (sole proprietors and self-employed professionals) to obtain coverage through the AHP provided they work 80 hours per month or 20 hours per week.

The AHP may not discriminate against an employer member or any individual employee eligible to participate in the plan on the basis of any health factor (e.g., claims experience or pre-existing conditions). The AHP may charge different premiums based on non-health factors. (The final amended rule, for example, gives the example of an allowable distinction in the case of an agriculture industry AHP that charges different premiums based on the sub-sectors of the member employer—crop farming, livestock, fishing, forestry).

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AHP's also remain subject to Affordable Care Act requirements on coverage quality like the offering of preventive services coverage, continuation of dependent coverage through age 26, and limits on waiting periods over 90 days.

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Economic Development
(DEED)



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