Gesmer Updegrove LLP

ClientUpdate

July 2018

Big Developments Regarding Sales Tax Triggers, Pay Equity Rules, Paid Leaves, and Minimum Wage

Physical Presence in State No Longer Necessary To Trigger Sales Tax

The obligation of an out-of-state retailer to collect and remit a state's sales tax has just changed dramatically. Under the old standard, an out-of-state retailer had to have some physical presence in a state (either property, activities, or representatives) before a state could require it to collect and remit sales tax. Under the new standard, no physical presence is required and "extensive virtual presence" in a state is sufficient to trigger the obligation.

The United States Supreme Court in *South Dakota v. Wayfair* eradicated the physical presence standard as "unsound and incorrect." The Supreme Court ruled that the correct standard in determining the constitutionality of a state tax law is whether the tax applies to an activity that has "substantial nexus" with the taxing state (i.e., significant quantity of business in the state with extensive virtual presence).

Wayfair examines the constitutionality of South Dakota's economic nexus law. This law asserts adequate nexus for an out-of-state retailer exists if that retailer made more than $100,000 in taxable sales of property or services into South Dakota or made taxable sales into South Dakota in 200 or more transactions. The Supreme Court found that a seller meeting those thresholds would have clearly availed itself of the privilege of doing business in South Dakota. The Supreme Court also held that the online retailers in this case had established substantial nexus through "extensive virtual presence" in South Dakota. With this new rule, e-commerce companies and sellers may have to comply with South Dakota's sales tax regimen.

The *Wayfair* opinion, though, does not provide the states with free rein to enforce all forms of economic nexus, however. The opinion found that South Dakota's tax system includes features designed to prevent discrimination against or undue burdens upon interstate commerce. For example, the South Dakota law has a safe harbor provision for transacting limited business in the state that does not meet the specific thresholds, the law is not retroactive, and South Dakota is a member of the Streamlined Sale and Use Tax Agreement, which reduces administrative and compliance costs for taxpayers and even provides state funded sales tax administration software.

Many states have adopted legislation similar to that of South Dakota and will most likely pursue online vendors for sales taxes. The question then becomes whether these other states economic nexus standards are similar to South Dakota and whether their laws discriminate against or impose an undue burden upon interstate commerce. Many states, including Massachusetts, have enacted economic nexus rules based on the presence of software in a given state (e.g., apps) and ancillary data (e.g., cookies) on a customer's computer or phone.

Massachusetts adopted an economic nexus regulation last year under which any internet vendor that has Massachusetts sales in excess of $500,000 and has made sales for delivery in Massachusetts in 100 or more transactions will be required to collect and remit sales tax if it has any of the following contacts with its customers in Massachusetts: (1) established a physical presence through property interests in and/or the use of in-state software (e.g., apps) and ancillary data (e.g., cookies) which are distributed to or stored on the computers or other devices of a vendor's in-state customers; (2) contracts and/or other relationships with content distribution networks; or (3) contracts and/or other relationships with online marketplace facilitators and/or delivery companies. Massachusetts might likewise pursue online vendors since the Supreme Court in *Wayfair* stated that it "should not maintain a rule that ignores these substantial virtual connections to the State."

Online vendors need to quickly adjust to this new tax landscape and consider collecting and remitting sales taxes in states with economic nexus standards consistent with the decision in *Wayfair*. It is possible that Congress may act to soften the impact of this case by enacting legislation to regulate what states can and cannot do regarding economic nexus, but until that happens, online retailers will be facing a dramatically different landscape.

Massachusetts' Law Sets Equal Pay Standard

Equal Pay for Comparable Work

Massachusetts' *Act to Establish Equal Pay Equity* ("Act") became effective July 1, 2018. It provides that an employer cannot compensate employees at a lower rate than the rate paid to other employees of a different gender for "comparable work." The Act describes "comparable work" as "work that is substantially similar in that it requires substantially similar skill, effort, and responsibility and is performed under similar working conditions."

Also under the Act, a mere job title or general job description alone cannot determine comparability. As such, employers will have to perform a closer evaluation of their employees' similar work performed under similar working conditions.

Acceptable Pay Differences

Though it may prove difficult for an employer to perform such a comparison of their employees' respective work, an employer will not be liable under the Act for pay differences in comparable work based on one of more of the following factors:

- A bona fide seniority system, provided that protected pregnancy-related, parental, family or medical leaves do not reduce seniority;
- A bona fide merit system;
- A bona fide system that measures quantity and/or quality of sales earnings or production;
- Differences in geographic locations of employees;
- Education, training and experience as they pertain to that particular job; and
- Regular and necessary travel as part of that job.

Affirmative Defenses Available to Employers

The Act provides a so-called "self-evaluation" defense for employers. This means that an employer's ability to demonstrate that "reasonable progress has been made towards eliminating compensation differentials based on gender" can be used as an affirmative defense against an employee's claim under the Act.

An employer can create this self-evaluation, so long as it is reasonable in scope and detail. Also, evidence of the employer's self-evaluation, and remediation steps taken under the Act, cannot be used at a later date as evidence of a violation under the Act, so long as the self-evaluation was completed prior to the alleged violation or within six months thereafter.

Wage Disclosures and the Act

The Act also makes it illegal for an employer to:

- Require that employees refrain from discussing or disclosing information pertaining to his or her own wages;
- Screen job applicants based on his or her own, current wages;
- Request or require a job applicant to disclose his or her own current wages or salary history;
- Seek the salary history of a job applicant from a current or future employer, unless the applicant provides express, written consent for access to that information.

Enforcement of the Act

The Act provides relief for employees under a private right of action. As such, an employee need not file a charge with the Massachusetts Commission Against Discrimination (MCAD) first.

A prevailing employee may recover damages including the difference between the wages actually earned and the wages earned by a comparable co-worker, liquidated damages, and attorney's fees and costs. Furthermore, the Attorney General may bring a cause of action under the Act.

Under the Act, an employee has a three-year statute of limitations period to file a claim from the time that a violation occurred. However, employers should be made aware of the fact that under the Act, an equal pay violation occurs every time an employee is paid, which may effectively reset the limitations period after each pay period.

"Grand Bargain" Will Impact Massachusetts Minimum Wage and Paid Leave

Massachusetts passed a so-called "Grand Bargain" bill that will impact minimum wage and paid leave in Massachusetts.

Future Increases in the Minimum Wage

While the federal minimum wage has held steady at $7.25/hour since 2009, Massachusetts has consistently imposed a higher rate on employers in the Commonwealth. Currently, in the Commonwealth, it stands at $11/hour. Under the new law, that number will increase incrementally to $15/hour by 2023. Additionally, tipped employees, who are normally subject to a much lower minimum wage, will also increase: from $3.75/hour currently to $6.75/hour in 2023.

The law will also eliminate mandatory time-and-a-half pay for work on Sundays and holidays, although employees may not be forced to work on those days.

Paid Leave

Beginning in 2021, employees will be allowed to take up to 12 paid weeks per year to care for a family member or bond with a new child and 20 weeks a year to handle a personal medical problem (not to exceed 26 weeks annually).

The weekly benefits under the program are paid from a state-wide Family and Employment Security Trust Fund, financed with a 0.63% payroll tax increase, which starts in July 1, 2019. Benefits are calculated as a percentage of an employee's existing salary, and are capped at $850/week. Self-employed workers are also permitted to participate.


Jeff Groshek


Joe Laferrera