A hiker with a backpack and trekking poles is seen from behind, walking along a ridge of a snow-capped mountain. The sky is a dramatic mix of orange, red, and yellow, suggesting a sunset or sunrise. The clouds are illuminated with the same warm colors, creating a high-contrast, atmospheric scene. The hiker's shadow is cast long and dark on the snow.

In the aftermath of *Wayfair*:  
Entity-level business tax nexus &  
the attack on P.L. 86-272

Ohio Business Tax Seminar

**June 8, 2022**



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# Today's presenters

## **Meredith Mullet**

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## **Bill Nolan**

Ernst & Young LLP  
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Ernst & Young LLP  
Pittsburgh, PA



# Today's agenda

Economic nexus post-*Wayfair*

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Remote Work considerations

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P.L. 86-272 developments

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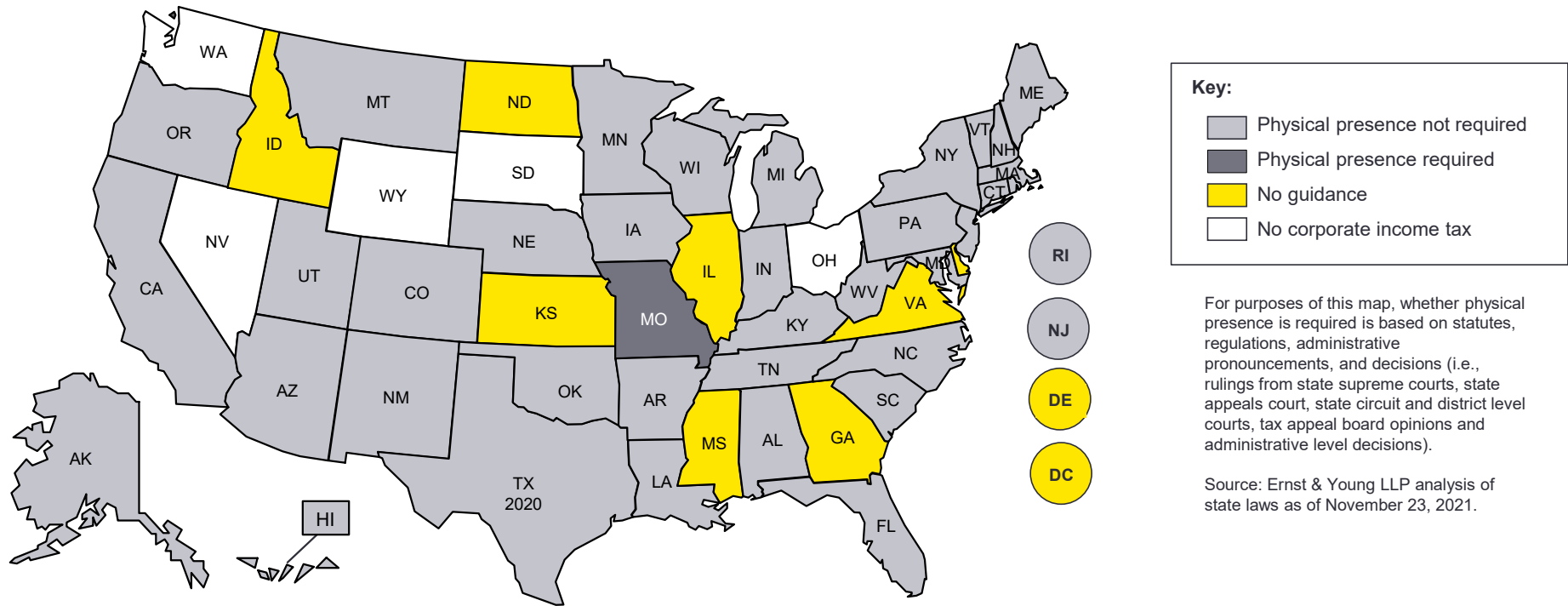
Taxpayer response



Economic nexus  
post-*Wayfair*



# Physical and economic income tax nexus (non-financial)



# Factor presence economic nexus standard

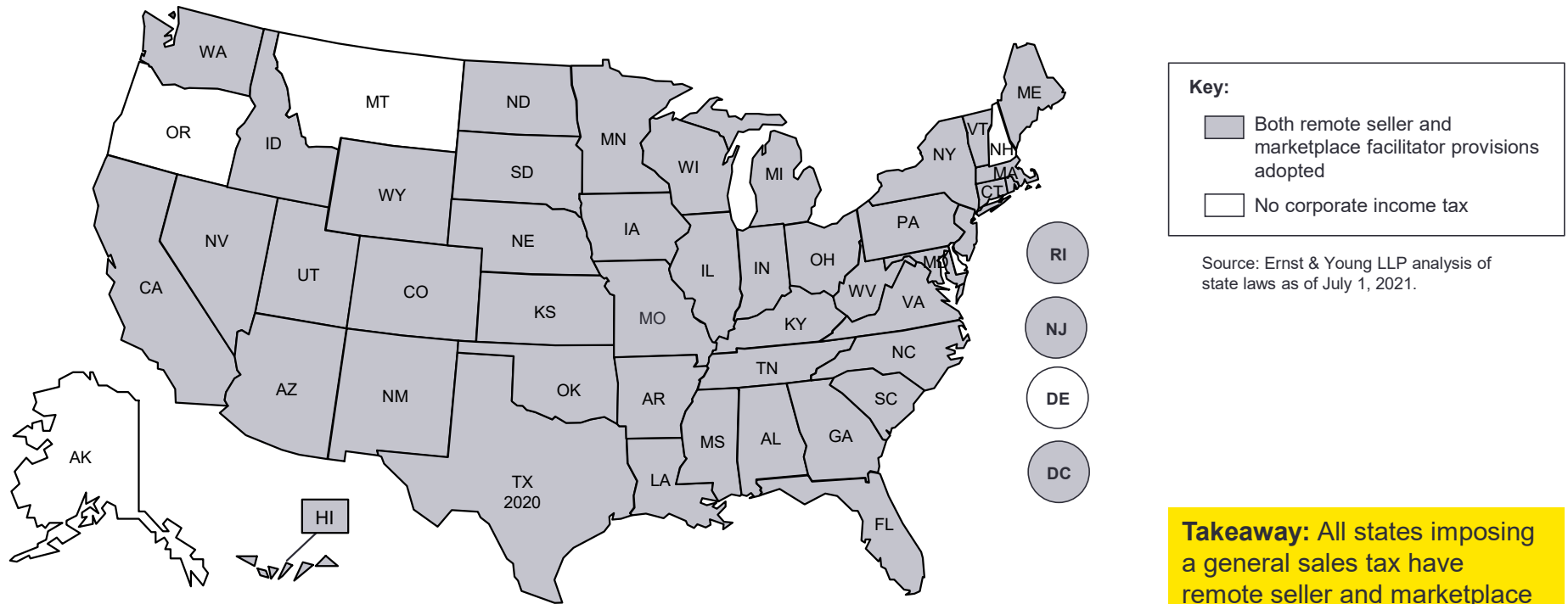
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- ▶ An increasing number of states employ bright-line thresholds for income tax nexus.
  - ▶ Most recent is Maine LD 1216 (Chapter 181), enacted June 11, 2021.
- ▶ Several states adopt the following factor presence-based thresholds:
  - ▶ \$50,000 of property; or
  - ▶ \$50,000 of payroll; or
  - ▶ \$500,000 of sales; or
  - ▶ 25% of total property, payroll or sales.

Physical presence thresholds

Economic presence threshold
- ▶ Reliance on state apportionment rules, which differ significantly, presents problems in implementing a bright-line economic nexus thresholds.
  - ▶ See, e.g., *Greenscapes Home and Garden Products, Inc. v. Testa*, 2019-Ohio-384, 129 N.E.3d 1060 (App. 10th Dist 2019).

# Remote seller and marketplace facilitator sales tax nexus





# Bright-line thresholds present challenges

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- ▶ For sales tax purposes, many jurisdictions employ a sales and/or transaction threshold, many following the South Dakota law:
  - ▶ \$100,000 or
  - ▶ 200 transactions.
  
- ▶ There is little uniformity in application of these thresholds, including:
  - ▶ Gross sales versus taxable sales
  - ▶ Retail or sale-for-resale sales
  - ▶ Internal (related party) sales exemptions
  - ▶ Sourcing rules, including ultimate destination
  - ▶ Supporting requirements



## Transaction threshold for sales tax nexus

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- ▶ States that have removed their transaction thresholds since enactment:
  - ▶ California
  - ▶ Colorado
  - ▶ Iowa
  - ▶ Maine
  - ▶ Massachusetts
  - ▶ North Dakota
  - ▶ Washington
  - ▶ Wisconsin

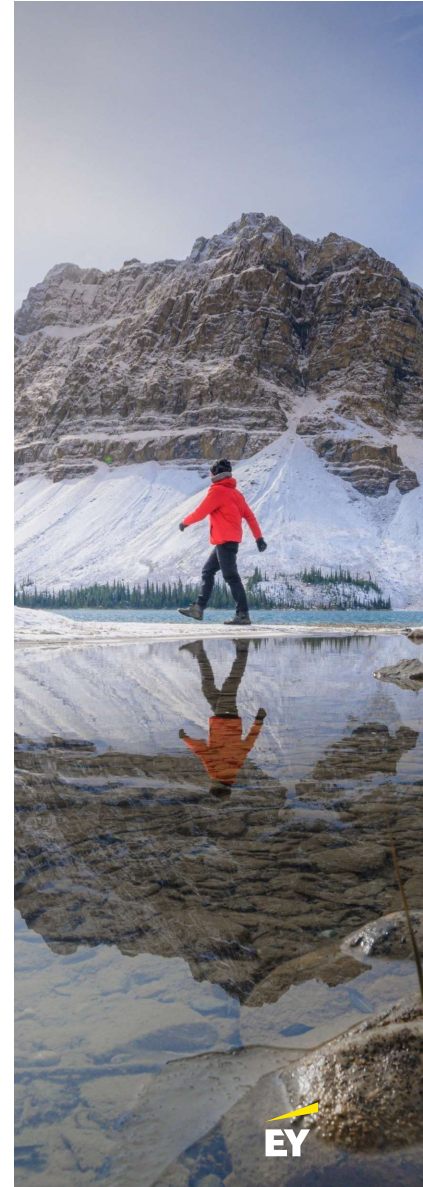
P.L. 86-272  
developments



# Restriction on state taxing authority

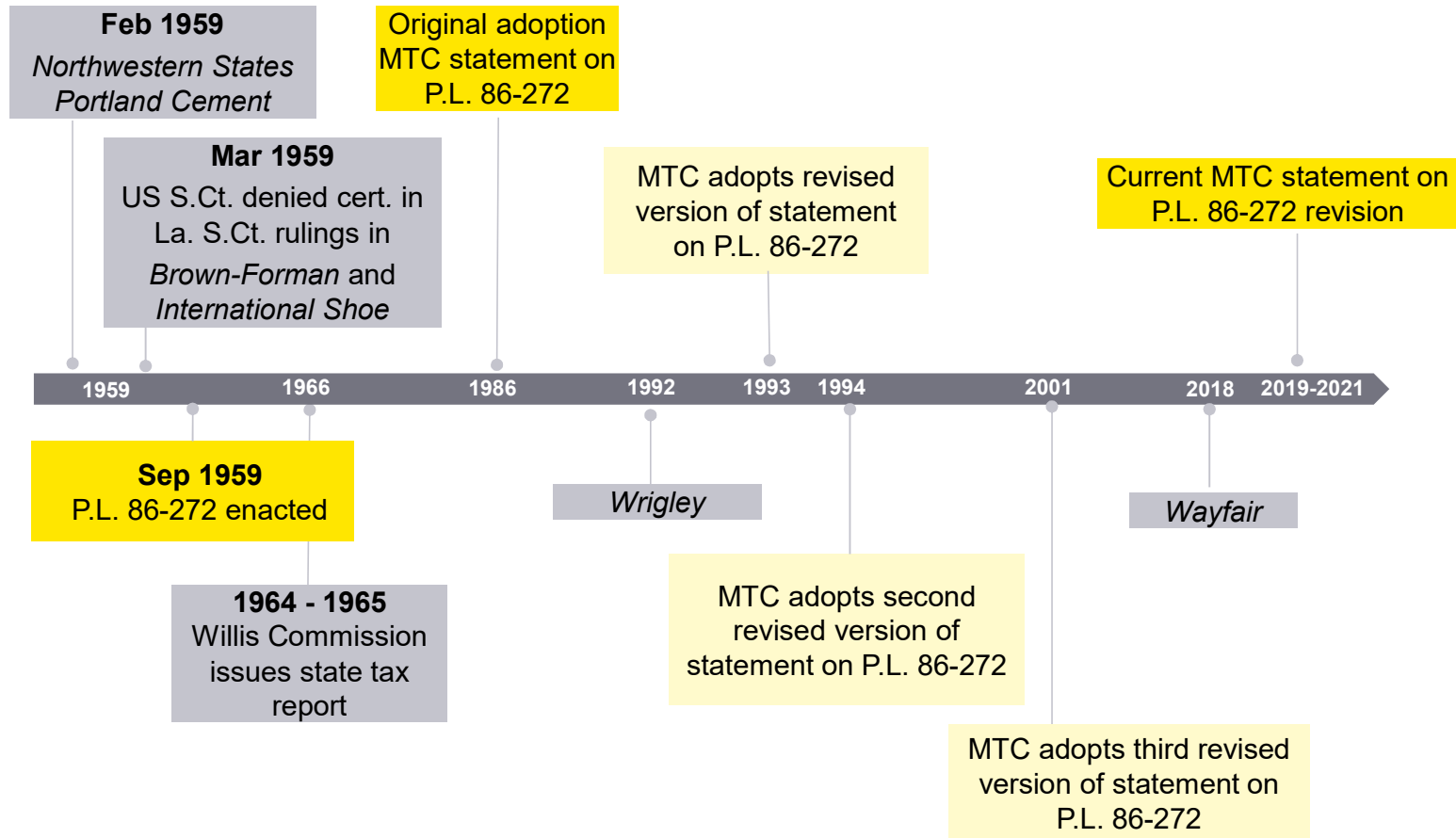
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- ▶ Public Law (P.L.) 86-272:
  - ▶ In Title I, Section 101, prohibits the imposition of state and local income tax on a certain corporations.
    - ▶ The law was designed to protect out-of-state corporations when the corporation's only in-state activity was the solicitation of sales and ancillary activities.
    - ▶ This protection only applies to state income taxes.
  - ▶ In Title II, Section 201, commissioned a congressional study of state taxation of interstate commerce.
    - ▶ That study, known as the Willis Report, indicated that P.L. 86-272 should be replaced with a more quantitative rule based in part on the volume of business done in a state.
    - ▶ The committee's activities and recommendations led to the eventual formation of the Multistate Tax Commission (MTC).





# P.L. 86-272: key events



## Revised MTC “statement of information” on P.L. 86-272

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- ▶ In its fourth revision of its statement of policies on implementing P.L. 86-272, adopted August 4, 2021, the MTC added a new section on unprotected (and protected) activities: “Activities conducted via the internet.”
  - ▶ The MTC cites the US Supreme Court’s finding in *South Dakota v. Wayfair, Inc.* that “[A] business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.”
  - ▶ Per the updated statement, “As a general rule, when a business interacts with a customer via the business's website or app, the business engages in a business activity within the customer’s state.”
- ▶ States (including non-member states) are free to adopt or otherwise **expressly indicate** support for the MTC’s statement by legislation, regulation, or other administrative action.

# State Adoption of MTC Revised Stmt - PL 86-272

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## ▶ California

- ▶ The California Franchise Tax Board (FTB) issued a [technical memorandum](#) in February 2022 that included the MTC's treatment of telecommuting and adopted its examples and analysis of P.L. 86-272 in the updated statement.
- ▶ By adopting this guidance, California requires both in-state and out-of-state businesses to analyze their website activities when assessing their tax filing profile.
- ▶ Currently unclear whether the FTB will apply FTB TAM 2022-01 prospectively or retroactively

## ▶ New York

- ▶ In April 2022, the New York Department of Taxation issued a [draft rule](#) that adopts select areas of the guidance through several MTC examples and analysis from the updated statement. The deadline to comment on the rule is June 30.
- ▶ The draft rule does not have an effective date, which could leave the door open for the state to apply the rule retroactively.

## ▶ Other states likely to follow

## Select examples of protected activities

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- ▶ The business provides post-sale assistance to in-state customers by posting a static list of FAQs with answers on the business's website.
  
- ▶ The business places Internet “cookies” onto the computers or other devices of in-state customers to gather customer information *only used for purposes entirely ancillary to the solicitation of orders for tangible personal property*, such as:
  - ▶ to remember items customers have placed in shopping carts during a current web session,
  - ▶ to store personal information customers have provided to avoid the need for the customers to re-input the information when they return to the seller's website, and
  - ▶ to remind customers what products they have considered during previous sessions.
  
- ▶ The business offers for sale only items of tangible personal property on its website where that website enables customers to:
  - ▶ search for items,
  - ▶ read product descriptions,
  - ▶ select items for purchase,
  - ▶ choose among delivery options, and
  - ▶ pay for the items.



## Select examples of unprotected activities

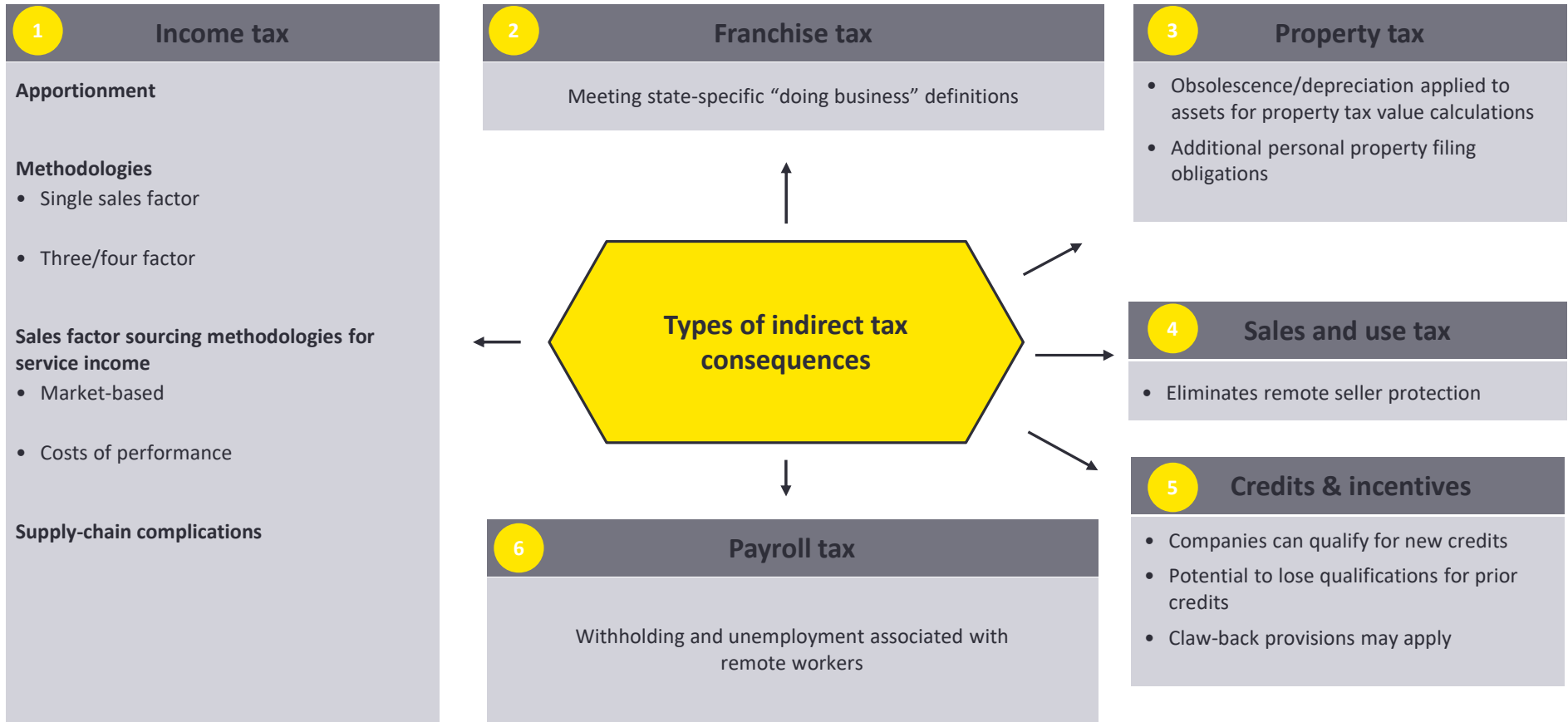
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- ▶ The business regularly provides post-sale assistance to in-state customers via either electronic chat or email that customers initiate by clicking on an icon on the business's website.
- ▶ The business's website invites viewers in a customer's state to apply for, and accepts applications for, non-sales positions with the business.
- ▶ The business places Internet "cookies" onto the computers or other electronic devices of in-state customers. These cookies gather customer search information which will be used to adjust production schedule and inventory amounts, develop new products, or identify new items to offer for sale.
- ▶ The business remotely fixes or upgrades products previously purchased by in-state customers from the business by transmitting code or other electronic instructions to those products via the Internet.
- ▶ The business contracts with in-state customers to stream videos and music to electronic devices for a charge.

# Remote Work Considerations



# State and local tax consequences of remote work



# Remote worker — employer and employee responsibilities



## Corporate responsibilities

- Employers are required to track where employees are working and withhold accordingly
- Other employment taxes may use location as a factor in sourcing, i.e. unemployment
- Employers are liable for under-withheld taxes
- Officers may be held personally liable
- Remote workers could also trigger income/franchise tax obligations

## Employee responsibilities

- Employees may be required to report their work location under state law (i.e., New York)
- Individuals are responsible for reporting income to the appropriate state regardless of their W-2
- Individuals may be liable for taxes not paid to the appropriate jurisdictions.
- Several nuances to consider — dual residency, convenience of the employer, non-resident credits.



# Taxpayer response



## Due Process Clause challenges

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- ▶ “Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual’s connections with a State are substantial enough to legitimate the State’s exercise of power over him.” *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).
- ▶ Necessary contacts with the forum state:
  - ▶ Due Process requires that person must have “purposefully avail[ed] itself of the privilege of conducting activities within the forum State.” The contacts must be the defendant’s own choice and not “random, isolated, or fortuitous.” *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1025 (2021).
  - ▶ Recently, the Louisiana Court of Appeals found that contacts with the state initiated by the activities of third parties were not sufficient to establish personal jurisdiction over the supposed taxpayer. Also, because there was no intentional or direct contact by the supposed taxpayer, there is no reason for it to have reasonably anticipated being brought into court in Louisiana. *Robinson v. Jeopardy Productions Inc.*, 2019 CA 1095 (La. Ct. App. 1st Cir. 2020), writ denied, 308 So. 3d 1166 (2021).

## Notable nexus cases

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- ▶ *Apex Laboratories Int'l Inc v. Dep't of Treasury*, Case No. 19-000095-MT (January 2021)
- ▶ *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, 20 CVS 7449, 2021 WL 2584282 (N.C. Super. June 23, 2021)
- ▶ *Online Merchants Guild v. Maduros*, No. 2:20-at-00954 (E.D. Calif., filed Sept. 29, 2021)
- ▶ *Reynolds Brands, Inc. v. Dep't of Revenue*, Docket No. BIT. 19-1160-JP, Docket No. BIT. 19-1161-JP, Docket No. BIT. 20-419-JP (Oct. 22, 2021)
- ▶ *Crown Packaging Technology Inc. v. Director*, Dkt. No. 003249-2012 (N.J. Tax Ct. 2019)

# Strategies available to taxpayers

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- ▶ Voluntary disclosure agreements
- ▶ Amnesty programs
- ▶ Pre-filing agreements
- ▶ Tax policy/advocacy
- ▶ Litigation





Thanks for participating.



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## Biographical Information

### **Meredith Mullet, Senior Manager, State Tax Operations The J.M. Smucker Co.**

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Meredith leads the Company's state tax processes and initiatives. Aside from overseeing state compliance and controversy activities, Meredith is involved with planning and various acquisitions/dispositions. In her previous role with the Company, Meredith served as Manager, Tax Compliance. Meredith coordinated the filing of the federal and state income tax returns. Meredith also helped manage the associated tax controversy resolution.

Prior to joining The J.M. Smucker Co., Meredith spent over 12 years in public accounting. She provided tax compliance and consulting services to several publicly traded multinational and privately owned companies. Meredith has experience with all facets of taxation including transactions, tax compliance, accounting for income taxes, and international and state taxation.

Meredith received her B.S. in Accounting from Ohio Northern University and is a Certified Public Accountant in Ohio. Meredith serves as the Chair of The Ohio Manufacturer's Association Tax Committee and serves her community on other non-profit boards.

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### **William G. Nolan, Managing Director, National Tax Department Indirect Tax / State and Local Tax, Ernst & Young LLP 330 255 5204 | [william.nolan@ey.com](mailto:william.nolan@ey.com)**

Bill works in EY's National Tax Department out of the Akron, Ohio office. Bill serves several Northeast Ohio clients as an Indirect Tax Service Line Leader. Bill is also a part of EY's State Desk network. Bill is the firm's Ohio Desk for income and sales/use taxes and is also serves as income tax desk for Iowa, Kentucky, Minnesota, Montana, Nebraska, North Dakota, and Wisconsin. In this role, Bill works with EY engagement teams and their clients on matters such as audit defense and resolution, refund reviews, and rendering day-to-day state tax advice. Bill is also active with tax committees in his various states participating in working groups with departments of revenue on matters such as drafting administrative rules and suggesting process improvements. Bill has been twice recognized as EY's Outstanding State Desk.

Bill frequently speaks on state and local tax topics at national and regional conferences, including the Georgetown State and Local Tax Institute, Council of State Taxation Advanced Income Tax School, Cleveland Tax Institute, Iowa Taxpayer's Association Tax Symposium, Pennsylvania Institute of CPAs Multistate Tax Conference, Kentucky Occupational License Tax Administrators Annual Meeting, the Kentucky Tax Conference, and the Ohio Business Tax Conference. He has had articles published in the Journal of Multistate Taxation and the ABA Tax Lawyer.

Bill is a member of the Ohio State Bar Association (member of tax committee), Ohio Society of CPAs, Kentucky Society of CPAs (member of tax committee), Wisconsin Society of CPAs (member of tax committee), and Iowa Taxpayer Association (member of tax committee). Bill serves as Treasurer and a member of the Board of Trustees for the Greater Akron Musical Association. He also serves on the Dean's Advancement Council for the University of Akron College of Business Administration.

Bill received his BBA (Accounting) at Cleveland State University in 1993 and is a Certified Public Accountant. Bill received his JD from Case Western Reserve University School of Law and was admitted to the Ohio Bar in 1996.

## Biographical Information

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Katie Zippel is a senior manager based in the Pittsburgh office. She has 10+ years of experience serving multinational business enterprises in tax risk mitigation and planning for state and local tax issues, including guidance on alternative business structures, lookback review opportunities, controversy and tax policy, tax accounting and audit support. Katie serves across a variety of industries, including Diversified Industrial Products, Consumer Products and Life Sciences. Katie also serves as an Indirect Service Line Leader within the Pittsburgh/Cleveland market. Katie serves as West Virginia Income/Franchise state desk.