

Kansas Wayfair Rule With No Safe Harbor Is Invalid, AG Says

By **Maria Koklanaris**

Law360 (September 30, 2019, 8:15 PM EDT) -- The Kansas Department of Revenue's policy to tax remote sellers without including a safe harbor for small sellers is invalid, the state's attorney general said in an opinion Monday, one day before the policy was scheduled to take effect.



Kansas Attorney General Derek Schmidt's nonbinding opinion concluded that the Department of Revenue's policy to effectively tax all remote sellers "has not been lawfully adopted." (AP)

Weighing in **at the request** of the Kansas Senate president and House speaker, Attorney General Derek Schmidt said in a nonbinding opinion that the tax agency exceeded its authority by imposing a unique post-Wayfair standard that would in effect tax all remote sellers. The two lawmakers, who like Schmidt are Republicans, had also asked the attorney general to determine if the action taken by the administration of Democratic Gov. Laura Kelly violated either the state constitution or the U.S. Constitution. Schmidt demurred, though, saying the matter could be settled without the consideration of constitutional questions.

Schmidt's opinion, while nonbinding, cast doubt on the future of Kansas' policy. That policy, expressed in an Aug. 1 notice, is "not a valid exercise by the department of any authority that may have been delegated to it by the Legislature," Schmidt wrote in his opinion.

"We think the categorical rule as implied in the notice ... has not been lawfully adopted and is invalid," Schmidt wrote.

A rule requiring all out-of-state retailers to collect and remit tax without exception, Schmidt added, is not consistent with the U.S. Supreme Court's 2018 decision in *South Dakota v. Wayfair*, which **abolished the standard** that businesses must have a physical presence in a state to be required to collect sales and use taxes. South Dakota had established economic nexus thresholds that only tax businesses with at least \$100,000 in annual sales or 200 transactions annually.

In its Aug. 1 notice establishing the policy on remote sellers, the department said that an **existing state statute** that allows Kansas to require retailers "to collect and remit tax under the provisions of the Constitution and laws of the United States" suffices as authority to tax remote sellers.

It is unclear how the administration will now proceed. Senate President Susan Wagle, R-Wichita, and

House Speaker Ron Ryckman, R-Olathe, called for Kelly to rescind the notice. Kelly's office did not respond to Law360's requests for comment, but Revenue Secretary Mark Burghart issued a statement that fully defended the notice, saying it was based on statute, and indicating that the department is moving ahead. The statement made no mention of rescinding the notice.

"This notice informs out-of-state retailers of the Wayfair result, which merely removed the constitutional physical presence requirement for such out-of-state retailers and thus leveled the playing field between in-state and out-of-state retailers," Burghart said. "Since the Wayfair decision, more than 3,200 out-of-state businesses have registered with the state to collect and pay taxes to Kansas. Almost 600 of those have registered since Aug. 1, 2019, when the notice was published. The Department of Revenue cannot select which laws it enforces."

On Sept. 25, Burghart publicly defended the state's decision to tax remote sellers without providing a safe harbor for small business, saying the Supreme Court's **Wayfair opinion** didn't require for small sellers to be granted any relief.

"There seems to be a little confusion about what this case does and does not do," Burghart said at the time. "Our law doesn't have a de minimis amount in there, but we don't see that as a constitutional mandate from the Wayfair case."

Earlier this year, the governor vetoed two bills that would have established a nexus threshold of \$100,000 in annual sales into the state, citing her disagreement with federal conformity provisions in the bills that were projected to lead to a drop in state tax collections. The Republican-heavy Legislature **failed to override** Kelly's veto of one bill and didn't attempt an override of the other.

In their statements Monday calling on Kelly to rescind, both lawmakers who asked the attorney general for an opinion said they were pleased with the result.

"The governor seems to think she can occupy the role of both the Legislature and the governor's office," Wagle said, adding that Kelly should have signed the Wayfair legislation that the Legislature sent to her.

Ryckman said the attorney general found "what appears to be an unlawful tax mandate" by the Kelly administration, which he suggested would have been challenged.

"The last thing Kansans want is to be on the hook for more costly lawsuits," Ryckman said.

Speaking to Law360, Scott Lindstrom of Polsinelli PC said he thought that the Legislature would have soon tried again to establish Wayfair thresholds.

"But if not, I would have expected this to be scrutinized, and I don't think the notice would have held up," Lindstrom said. "I think it's the right decision for now, and hopefully the Kansas Legislature acts in the near future to clear up any ambiguity."

Diane Yetter of the Sales Tax Institute and Yetter Tax Consulting told Law360 she had expected the attorney general's opinion and had advised her clients to hold off on registering with Kansas until he issued it.

"I didn't think [the Kansas notice] met the standards of what the Wayfair case said," Yetter told Law360, noting that the Supreme Court praised South Dakota for the absence of an undue burden and for having a safe harbor.

"In my opinion, having a zero threshold didn't meet those standards," Yetter said.

--Additional reporting by Paul Williams. Editing by John Oudens.