



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2017 Wisconsin Act 368
[2017 Senate Bill 883]

Income Tax and Transportation

2017 Wisconsin Act 368 makes changes concerning certain income tax provisions and creates new requirements concerning certain transportation projects.

INCOME TAX

Collection of Sales and Use Tax From Out-of-State Retailers

The 2018 Supreme Court case, *South Dakota v. Wayfair, Inc.*, 585 U.S. ___ (2018), overruled the longstanding precedent which had required a retailer to have “physical presence” in a state before a state may compel a retailer to collect sales taxes. [See, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).] The Court instead upheld the South Dakota law requiring an out-of-state seller to collect sales tax if the seller delivered more than \$100,000 in goods or services or engaged in 200 or more separate transactions in the state.

The act clarifies the Department of Revenue’s (DOR) authority to collect state sales and use taxes under the *Wayfair* decision. The act expands the definition of a “retailer engaged in the business in this state” for the purposes of sales taxation to any retailer that has annual gross sales exceeding \$100,000 or that has 200 or more separate sales transactions into Wisconsin annually. This change will likely result in the collection of additional sales tax in Wisconsin.

In addition, current law requires DOR to determine the amount of additional revenue collected from the state sales and use tax as a result of any federal law that expands the state’s authority to collect sales and use taxes from out-of-state retailers. Following that determination, DOR must then determine how much the individual income tax rates may be reduced in the following taxable year in order to decrease individual income tax revenue by the amount of additional sales and use tax revenue. Finally, DOR must certify its determinations to the secretary of administration, the governor, and the Legislature and specify that the new individual income tax rates will take effect in the following year.

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature’s Web site at: <http://www.legis.wisconsin.gov>.

The act provides that the new individual income tax rates based on the determinations will not take effect automatically in the year following DOR's certification, but, instead, DOR will determine the new tax rates to take effect for the taxable year ending on December 31, 2019. DOR must report its determinations to the governor, the Joint Committee on Finance (JCF), and the Legislative Audit Bureau (LAB). LAB must then review the determinations and report its findings to JCF and the Joint Legislative Audit Committee. Lastly, if LAB's review results in a redetermination of the rates, JCF will determine which rates apply to the taxable year ending on December 31, 2019, and report its determination to the governor, the secretary of administration, and the secretary of revenue.

Income and Franchise Tax for Pass-Through Entities

Under current law, tax-option corporations (S corporations), partnerships, and limited liability companies (LLCs), collectively referred to as pass-through entities (PTEs), are not subject to state income or franchise tax at the entity level. Instead, PTEs pass income, losses, or deductions of the business through to the individual income tax returns of their respective shareholders, partners, or members who then pay the appropriate taxes under the individual state income tax rates.

The act permits PTEs to elect to be taxed at the entity level for the purpose of Wisconsin income and franchise taxes. If a PTE elects to be taxed at the entity level, through consent of the majority share ownership or majority partnership, the entity is taxed at the rate of 7.9 percent of net income reportable to Wisconsin and subject to the following:

- The situs of the income is determined as if the election was not made.
- Tax credits, other than those paid to another state, may not be claimed by the PTE.
- The PTE may not claim carry-forward or carry-back losses.
- Provisions of state law relating to estimated payments and underpayment interest apply beginning in 2019 and later years.
- If a PTE fails to pay the amount of tax owed to DOR with respect to income as a result of the election, DOR may collect the amount from the partners based on their proportionate share of such income.

Under the act, businesses may elect to be taxed at the entity level for taxable years beginning in 2018 for S corporations and for taxable years beginning in 2019 for all other PTEs.

TRANSPORTATION

Use of Federal Funds

The act requires the Department of Transportation (DOT) to expend federal funds on at least 70 percent of the aggregate project components eligible for federal funding each fiscal year for the following types of projects on which DOT expends federal moneys:

- Southeast Wisconsin freeway megaprojects.
- Major highway development projects.

- State highway rehabilitation projects with a total cost of less than \$10 million.

The act creates an exception to this requirement that involves a passive review procedure by JCF. Specifically, the Act authorizes DOT to submit a proposed alternate funding plan to JCF if DOT determines that it cannot meet the requirements outlined above or that it can make more effective and efficient use of federal moneys than the use requirements outlined above. The act allows DOT to expend moneys as proposed in the alternate funding plan if, within 14 working days after submittal of the plan, the JCF cochairpersons do not notify DOT that JCF has scheduled a meeting to review the plan. If, within 14 working days after the plan's submittal, the JCF cochairpersons notify DOT that JCF has scheduled a meeting to review the plan, DOT may only expend moneys as proposed in the plan with JCF's approval. However, the act authorizes DOT to continue with any projects subject to the act's funding requirements while JCF conducts its review, including any hearings conducted by JCF.

The act's provisions regarding use of federal funds take effect, and first apply to projects let and aid disbursed, on July 1, 2019.

Local Projects

The act requires DOT, if disbursing aid to a political subdivision for a project, to notify the political subdivision whether the aid includes federal moneys and the project components for which federal moneys must be paid, if any. Under the act, "project" means the development, construction, repair, or improvement of a local road or a local bridge.¹

The act prohibits DOT from requiring a political subdivision to comply with any portion of DOT's facilities development manual, other than design standards, for any project that meets all of the following criteria:

- The project proposal is reviewed and approved by a professional engineer or by the highway commissioner for the county in which the project will be located.
- The project is conducted by a political subdivision with no expenditure of federal money.

The act also requires that any local project, as defined under the act, funded in whole or in part with state funds under the surface transportation urban program, the surface transportation rural program, or the local bridge program be let through competitive bidding and by contract to the lowest responsible bidder, pursuant to certain provisions under current law related to bids.

The act's provisions related to local projects take effect, and first apply to projects let and aid disbursed, on July 1, 2019.

¹ The act defines "local roads" as streets under the authority of cities or villages, county trunk highways, or town roads, and defines "local bridge" as a bridge that is not on the state trunk highway system or on marked routes of the state trunk highway system designated as connecting highways.

Transfers of State and Federal Moneys

The act repeals certain provisions created by 2017 Wisconsin Act 59, the 2017-19 Biennial Budget Act. Specifically, the act eliminates DOT's authority to make transfers of state and federal moneys between the highway program, as well as a related appropriation. The act also eliminates the requirement that DOT study the effects of consolidating state moneys in the surface transportation program and replacing these funds with federal moneys from the state highway program. The act's repeal of these provisions takes effect on July 1, 2019.

Effective date: December 16, 2018, except as set forth above.

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