

House Bill 578: Out-of-State Retailers

New Presumption Applied to Definition of a Retailer Engaged in Business in this State

Recently enacted legislation, House Bill 578, amended the Idaho Sales Tax Act to provide a presumption that under certain conditions out-of-state retailers making sales to customers located in Idaho are retailers engaged in business in the state. The law is effective July 1, 2018.

A retailer engaged in business in this state must file an application for a seller’s permit with the Idaho State Tax Commission and collect and forward sales tax on any sales made to Idaho customers. (Idaho Code section 63-3620.)

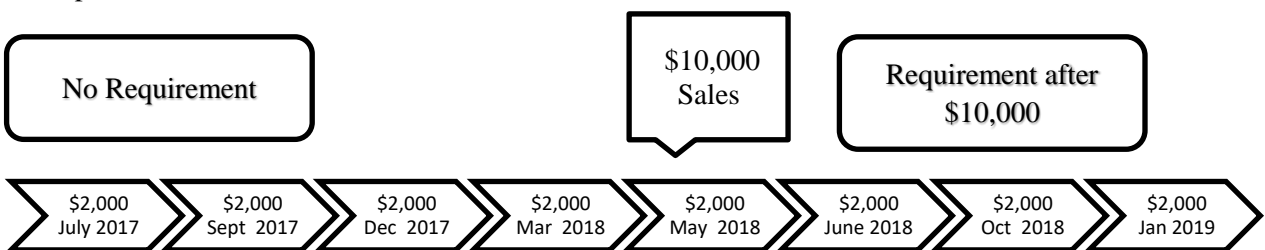
The presumption is created when both of the following conditions exist:

1. The out-of-state retailer has entered into an agreement, directly or indirectly, with one or more **Idaho retailers*** who, for a commission or other consideration refer potential purchasers to the out-of-state retailer in the following ways:
 - a. A link on an internet website,
 - b. Written or oral presentation, or
 - c. Any other similar type of referral.

and

2. The total sales made by the out-of-state retailer to Idaho customers as a direct result of the referrals made by all Idaho retailers described above exceed \$10,000 during the preceding 12 months. The out-of-state retailer has no requirement to collect sales tax until those sales exceed the \$10,000. The out-of-state retailer has a requirement to collect and forward sales tax on any sale made to Idaho customers on any subsequent sales.

Example:



* The term “Idaho retailer” for purposes of this guidance is a person required to have an Idaho sales tax permit. See Idaho Code sections 63-3610 and 63-3611.

Advertising

An agreement to place an advertisement doesn’t give rise to the presumption described above. (See Example 6.)

Presumption that solicitation takes place may be rebutted

An out-of-state retailer may rebut the presumption that it's soliciting sales in Idaho through an Idaho retailer by meeting both of the following conditions:

- 1. Contract** - The contract or agreement between the out-of-state retailer and the Idaho retailer provides that the Idaho retailer is prohibited from engaging in any solicitation activities in Idaho that refer potential customers to the out-of-state retailer including, but not limited to: distributing flyers, coupons, newsletters, and other printed promotional materials, or electronic equivalents; verbal solicitation (e.g., in-person referrals); initiating telephone calls; and sending emails.

and

- 2. Proof of compliance condition** - Each Idaho retailer submits to the out-of-state retailer, at least once a year, a signed certification stating that the Idaho retailer hasn't engaged in any prohibited solicitation activities in Idaho, as described above, at any time during the previous year:

- *Annual Certification* - The Idaho retailer may submit the annual certification to the out-of-state retailer in paper form or electronically, and the certification must contain the following elements:
 1. It must be signed (either manually or electronically) by the person who has the authority to execute binding contracts on behalf of the Idaho retailer.
 2. It must also show the name and address of the Idaho retailer.

An out-of-state retailer will have satisfied this condition if it receives the completed certifications from the Idaho retailer and the out-of-state retailer accepts the certifications in good faith (that is, the out-of-state retailer doesn't know or have reason to know that any of the certifications are false or fraudulent).

The out-of-state retailer must keep copies of the certifications that are signed by and received from the Idaho retailer, in either hard-copy or electronic format, as part of the out-of-state retailer's recordkeeping requirements. Also, the out-of-state retailer must make the copies available to the Tax Commission on request.

There's no specific form required for this certification process. The out-of-state retailer may choose any form of certification that contains the information listed above.

If the out-of-state retailer meets the two conditions described above, it can effectively rebut the presumption. This means the out-of-state retailer doesn't need to get an Idaho seller's permit and collect tax unless the Tax Commission later determines that the Idaho retailer is engaging in solicitation activities in Idaho or the out-of-state retailer is a retailer engaged in business in this state for some other reason (e.g., the out-of-state retailer has employees in Idaho).

Prospective Application

The Idaho State Tax Commission will require out-of-state retailers who don't rebut the presumption to collect and forward tax for retail sales occurring only on and after July 1, 2018.

EXAMPLES

Example 1:

CAB Company (CAB) manufactures and sells specialty fitness equipment. CAB is located in Arizona, where it has its manufacturing plant, administrative offices, and catalog call center. CAB has no retail outlets in Idaho. Other than making sales of its products as described below and having them delivered in Idaho by common carrier trucking companies, CAB has no other connection with Idaho.

CAB maintains a market for its products in Idaho mainly by entering into agreements with Idaho health and fitness retailers located throughout the state where the Idaho retailers refer customers to CAB's fitness equipment products. When a person buys a product from CAB, the Idaho retailer is identified and paid a commission equal to 5% of the selling price of the product. During the immediately preceding 12 months, CAB's sales to customers in Idaho (as identified by delivery addresses) made through its agreements with the Idaho retailers totaled \$38,628.

Conclusion: CAB is presumed to be a retailer engaged in business in this state and must register as an Idaho retailer, collect Idaho sales tax, file sales tax returns, and forward the tax to the state.

Example 2:

CAB Company (CAB) manufactures and sells specialty fitness equipment. CAB is located in Arizona, where it has its manufacturing plant, administrative offices, and catalog call center. CAB has no retail outlets in Idaho. Other than making sales of its products as described below and having them delivered in Idaho by common carrier trucking companies, CAB has no other connection with Idaho.

CAB maintains a market for its products in Idaho mainly by entering into agreements with youth soccer clubs throughout Idaho, where the clubs refer club members to CAB's fitness equipment products. The youth soccer clubs aren't required to have an Idaho sales tax permit. When a club member buys a product from CAB, the member's club is identified and paid a commission equal to 5% of the sales price of the product.

In the immediately preceding 12 months, CAB's sales made through its agreements with the clubs located in Idaho totaled \$38,628.

Conclusion: CAB isn't presumed to be a retailer engaged in business in this state because the

referrals didn't come from an Idaho retailer.

Example 3:

XYZ Company (XYZ) is an internet-based retailer of sporting goods specializing in downhill skiing equipment. XYZ is located in Vermont, where it has its administrative offices and its warehouse holds its inventory for sale. XYZ makes sales of its merchandise throughout the United States and has customers in Idaho. The merchandise sold by XYZ is delivered by the U.S. Postal Service or by common carrier.

As part of its marketing plan, XYZ has entered into agreements with several Idaho ski equipment retailers located in Idaho where the ski retailers will maintain links to XYZ's retail website on the ski retailers' own websites. XYZ will pay a commission to the ski retailers based on the sales that XYZ makes that originate from these links.

In the immediately preceding 12 months, XYZ has sales to customers in Idaho of its merchandise based on these agreements with the Idaho ski retailers totaling \$9,000.

Conclusion: XYZ isn't presumed to be a retailer engaged in business in this state. Although XYZ is soliciting sales in Idaho through the Idaho ski retailers, the \$10,000 threshold for sales hasn't been met.

Example 4:

This example assumes the same facts as in Example 3. Except, the only way ski retailers refer potential customers to XYZ is by distributing flyers in Idaho that promote the links to XYZ on the ski retailers' websites. The sales of its merchandise based on the agreements with the Idaho ski retailers is \$15,000.

Conclusion: XYZ is presumed to be a retailer engaged in business in this state and must register as an Idaho retailer, collect Idaho sales tax, file sales tax returns, and forward the tax to the state. The flyers solicit sales, and the \$15,000 exceeds the \$10,000 threshold.

Example 5:

T sells a variety of small tools nationwide, over the internet. T's home office is in Arkansas, where its warehouse and administrative offices are located. Other than making sales of its products as described below which are delivered to its customers in Idaho by common carrier, T has no other connection with Idaho.

T enters into a contract with S, a service provider. Under the contract, S enters into agreements with Idaho retailers on behalf of T, where the Idaho retailers agree to refer potential customers to T's website to buy T's products by placing T's product links on their websites. Under the contract, S tracks sales of T's products resulting from the referrals from the Idaho retailers' websites. S distributes commissions to the Idaho retailers based on these sales from an account maintained by S on behalf of T for this purpose.

In the preceding 12 months, T's sales made to Idaho customers under its agreements with S and the Idaho retailers as described above total \$68,000.

Conclusion: T is presumed to be a retailer engaged in business in this state because it does so indirectly through S, a service provider. T must register as an Idaho retailer, collect Idaho sales tax, file sales tax returns, and forward the tax to the state.

Example 6:

G Inc. (G) is an internet-based retailer of sports equipment and supplies. G's home office is in North Carolina, where its warehouse and administrative offices are located. G makes sales of its products nationwide, including Idaho, and its products are delivered to its customers by common carrier. Other than having customers in Idaho and the agreements described below, G has no other connection with Idaho.

As part of its business plan to market its products in Idaho, G enters into agreements with several sports retailers in Idaho to place online advertisements on their websites. When clicked, the advertisements lead the website user to G's retail website. In exchange for placing G's advertisements on its website, G will pay the sports retailers a set fee based only on the number of clicks on the link to G's website, whether or not sales are made.

Conclusion: G isn't presumed to be a retailer engaged in business in this state because G's agreement with the sports retailers is merely to place advertising on their websites.