

Streamlined Sales Tax Implementation Delayed

Special to the Business Insider

Loren Chumley, Commissioner, Tennessee Department of Revenue

Governor Phil Bredesen has announced that he supports a delay until July 1, 2007, of the implementation of the Streamlined Sales Tax law changes scheduled to take effect July 1, 2005. While Tennessee plans to delay the effective date of the law changes, the state will still be able to petition to be an Associate Member when the Streamlined Sales and Use Tax Agreement takes effect—possibly as early as October 1, 2005—and will remain a vital part of the national dialogue on this issue. Legislation is in the General Assembly to enact the delay.

The Streamlined Sales Tax Project started in 1999 at the request of the National Conference of State Legislatures and the National Governors Association. Both were concerned that states were losing significant revenue because they could not require remote sellers with no physical presence in the state to collect sales and use taxes. The loss is exacerbated by the growth in electronic commerce sales. In a study updated in July 2004, Dr. Bill Fox from the University of Tennessee estimates that Tennessee lost between \$436.3 million and \$454.7 million last year. These losses could reach \$612.5 million to \$957.9 million by 2008.

While the loss of revenue was certainly a motivating factor in the effort, two other factors were also critical: (1) in-state retailers are at a competitive disadvantage to out-of-state sellers selling the same goods without collecting tax; and, (2) the compliance with tax laws by multi-state businesses is too complicated.

With the recent addition of New Mexico, there are now 43 states plus the District of Columbia involved in the Streamlined Sales Tax Project. In addition to the states, members of the business community and the local governments have been actively involved in the project. Their efforts to create more uniform and simple tax policy and procedures are contained in the Streamlined Sales and Use Tax Agreement (the “Agreement”). Twenty-one states have passed legislation that either fully or partially conform their laws to the Agreement. Two other states are expected to pass legislation this calendar year.

The Agreement requires many changes in Tennessee’s tax laws including the adoption of uniform definitions, a uniform sourcing rule, and changes to our rate and base structure. Information regarding the requirements of the Streamlined Sales and Use Tax Agreement may be found on the Tennessee Department of Revenue’s website at www.tennessee.gov/revenue or on the project’s website at www.streamlinedsalestax.org. Some of the favorable changes for business include simplified exemption administration and the removal of the burden of due care on resale certificates, a minimum time notice of local tax rate changes, more favorable provisions for taking a bad debt credit, and the ability to use a “multiple points of use” certificate for software that is used concurrently in more than one jurisdiction.

The primary challenge for Tennessee has been the adoption of the change to our “sourcing rule” on which jurisdiction has the right to tax a transaction. The uniform rule under the Agreement, which a majority of states currently apply, is a “destination sourcing rule.” Under this rule, the point at which a sales tax is levied is the point at which the purchaser takes possession of the good. For over the counter sales, there is no change for Tennessee

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The primary role of the Tennessee Chamber is to be the voice of its members at the State Capitol. Everyday during the legislative session, Chamber lobbyists work with legislators and other officials to protect and promote business in Tennessee. We pay close attention to any changes in the law that would affect our ability to advocate on your behalf. The Legislature recently enacted legislation requiring greater disclosure requirements for legislators as well as restricting the ability of local and state lawmakers to lobby.

— Deborah K. Woolley, President

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Lobbying Laws Tightened

Thomas Hayden Lee, Esq., of Waller Lansden Dortch & Davis

Businesses and individuals seeking to influence state and local government likely will soon face criminal penalties for entering into, or failing to disclose, consulting and lobbying contracts with state and local officials.

The penalties are part of a bill that now requires, following passage by the Senate this week, only Governor Phil Bredesen's signature before becoming law. The House passed the same bill last Thursday. The bill, a product of a legislative conference committee, prohibits certain lobbying and consulting agreements and requires disclosure of others. It is set to take effect July 1, 2005. Both the prohibitions and the disclosure requirements apply to "consulting services," which are defined to include three types of services: (1) services to advise or assist in influencing legislation; (2) services to advise or assist in influencing administrative actions; and, (3) services to advise or assist in maintaining, applying for, soliciting or entering into a government contract. All of the bill's prohibitions, and most of the disclosure requirements, apply equally to services designed to influence state and local governments.

Prohibitions

The bill bans compensation for government consulting services to a state legislator, legislator-elect, the Governor, member of his or her staff, city and county elected officials, and the state's Secretary of State, Treasurer and Comptroller. Violations amount to Class A misdemeanors, punishable by expulsion from office, and jail or fines.

Disclosures

Companies and individuals would have to disclose any contracts for consulting services with any employee of the state legislative or executive branches (some 40,000 persons in all), or members of certain state commissions or boards. The disclosure must include the amount paid. The same disclosure requirement applies to the covered government employees and officials.

State and local officials subject to the consulting ban also will have to disclose if any member of their immediate family is required to register as a state lobbyist and state publicly, prior to taking any official action, that "it may be considered that I have a degree of personal interest in the subject matter of this bill or action." Violations of these disclosure provisions are Class C criminal misdemeanors, punishable by up to thirty days in jail and a \$50 fine.

Attorney Exemption

The enacted legislation contains one important exception. The definition of "consulting services" exempts representation of clients by licensed attorneys in

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Reducing the Rising Costs of Employer-Sponsored Health Plans

M. Sean Sullivan, Esq., of Waller Lansden Dortch & Davis

With medical costs increasing each year, human resource specialists are caught in a never-ending battle to keep costs down while providing competitive benefits to company employees. Thankfully, there are a few maintenance items for health and disability plans that not only keep the plans in legal compliance, but also result in cost savings for the company.

Claims Administration

In 2002 and 2003, new rules from the U.S. Department of Labor (DOL) became effective governing the manner in which health and disability plans process benefit claims. These rules placed significant new burdens on plan administrators. In particular, the DOL shortened the time period for plan administrators to approve or deny claims.

Further, the new rules required that denial letters include detailed information about the reason for the denial and the claimant's appeal and litigation rights. Appeals must be determined by a different committee from that which initially denied the claim, and no person on the appeals committee may be a subordinate of a person on the first committee.

Many companies have outsourced the general administration of their health and disability plans to third-party administrators, and so are unaware of whether their plans comply with the new claims administration rules. Many of these plans still are not

in compliance with the new rules. Non-compliance can have a significant financial impact on self-funded plans. Although a court will generally defer to a plan administrator's decision unless that decision was arbitrary, many courts will not give this discretion if the plan administrator failed to follow the new claims administration rules.

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As anyone who has been involved in benefits litigation knows, this can mean the difference between winning and losing a benefits case. In addition, as a fiduciary of the plan, a plan sponsor has a legal duty to its employees and their beneficiaries to ensure that claimants receive a fair hearing of their claims for benefits.

Ensuring compliance with DOL claims procedures is relatively simple. It is recommended that plan sponsors request sample claims files from their in-house or third-party administrators at least once a year. The plan sponsor should review the files and any denial

letters to determine whether the plan administrator is responding to claims in a timely manner.

Denial letters should be reviewed to ensure that they provide a detailed reason for the denial, references to the specific plan provisions upon which the denial is based, an explanation of the plan's review procedures, the time limits for appeals and an explanation of the claimant's rights to bring a civil action. In addition, the plan sponsor should make certain that the letters are written in a manner that is easily understood by the average plan participant.

Subrogation

Most health and disability plans include a subrogation clause. This clause gives the plan the right to recover benefits from a claimant if the claimant is later paid by another source. Although subrogation clauses give plan sponsors the right to recover thousands of dollars every year, the difficulty of enforcing subrogation rights discourages many plan sponsors from pursuing recovery at all.

Other plan sponsors outsource the enforcement of subrogation to third-party administrators. Recent decisions from the U.S. Supreme Court and certain Circuit Courts have increased the difficulty of enforcing subrogation rights.

Despite these challenges, it is still wise for companies to revisit their

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The TOSHA Volunteer STAR Program

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Bridgestone Americas Holding, Inc.



The Voluntary Protection Program (VPP), known as the Volunteer STAR award in Tennessee, is designed to recognize and promote effective safety and health management in the workplace. In the VPP, management, labor and the Tennessee Occupational Health and Safety (TOSHA) department establish a cooperative relationship at a workplace that has implemented a comprehensive program. The VPP concept recognizes that compliance enforcement alone can never fully achieve the objectives of the Occupational Safety and Health Act. As we in the business community already know, good safety

management programs that go beyond the TOSHA standards can protect workers more effectively than simple compliance.

To participate, you must submit a written application to TOSHA. The four main criteria are: (1) management leadership and employee involvement; (2) worksite analysis; (3) hazard prevention and control; and, (4) safety and health training. The application guideline is included in a VPP information kit available through TOSHA. The VPP application process is rigorous to ensure that only the best programs qualify. TOSHA reviewers, however, do not look for a single correct way to meet VPP requirements. Rather, they want to see a system that works for you. Some successful programs involve a lot of written documentation, while others do not.

After the written application is reviewed and approved by TOSHA, an onsite review will be scheduled that focuses on written program evaluation, employee interviews, and a site audit. Contractor safety also receives a lot of attention. Typically, the onsite review lasts one week and is performed by TOSHA experts in health, safety and industrial hygiene. The auditors may also include Special Government Employees (SGEs), who are safety and health professionals from other Volunteer STAR sites. Volunteer STAR sites generally experience from 60 to 80 percent fewer lost workday injuries than would be expected of an “average” site of the same size in their industry. Additional benefits that have been cited include reduced workers' compensation costs, recognition in the community, and improved employee motivation to work safely, leading to better quality and productivity. VPP participants are a select group of facilities with outstanding safety and health programs. There are currently 20 facilities that have achieved Volunteer STAR status in the state of Tennessee.

On July 8, 1997, the Bridgestone Firestone radial truck tire manufacturing plant in Warren County was the third recipient of the Volunteer STAR award in the state of Tennessee. It was also the first tire plant in the United States to receive the award since the federal program started in 1982. Since then, only one other tire manufacturing plant has achieved STAR status—another Bridgestone Firestone plant in Aiken County, South Carolina. (Now that a benchmark has been established, we have many other interested plants participating in VPP.)

This achievement has been a source of great pride not only for the teammates at our Tennessee and South Carolina STAR plants, but also the entire corporation. As Mark Emkes, our Chairman & CEO, constantly reminds us, safety is our top priority. Participation in the VPP process not only demonstrates that commitment, but more importantly, provides another tool for continuous safety and health improvement. I encourage all employers to look into VPP. There is a terrific group of safety and health professionals at TOSHA available to assist you. Because this is part of their consultative services, it is free of charge and you do not have to worry about citations and penalties.

For more information, contact TOSHA VPP Manager Jim Flanagan at 615-741-5421 or go to the Volunteer STAR website at www.state.tn.us/labor-wfd/vppstar.html.





Merger Creates Huge Industrial Union

Maury Nicely, Esq., of Miller & Martin PLLC

A growing trend in the labor relations arena is the merger of two or more unions into a single “mega-union.” In step with this trend, a significant merger has taken place recently between the United Steelworkers of America (USWA) and the Paper, Chemical, and Energy Workers (PACE), creating the largest industrial union in North America.

The new union, collectively referred to as the United Steelworkers (USW), will have 850,000 active members (and another 400,000 retired members) in 8,000 bargaining units. It is remarked that “[t]he newly merged union will be the dominant union in North America in metals, paper and forestry products, tire and rubber, mining, glass, chemicals, energy and other basic resource industries. It also will have a very strong presence in equipment and machinery, stone, clay and concrete, other manufacturing, transportation, utilities and the service sector.”

This development comes on the heels of a recent strategic alliance (February 7) between the USWA and the Australian

Steelworkers Union (130,000 workers) to cooperate in worldwide battles with “recalcitrant” employers.

Union mergers have two central benefits for members: greater financial resources and increased political clout. In addressing the financial benefits of the merger, PACE President Boyd Young remarked, “PACE members will have access to a \$150 million defense fund so that we can take on employers who make unreasonable demands at the bargaining table.

Furthermore, with an organizing budget of over \$30 million per year, we have the ability to strategically organize workers in our core industries.” As this indicates, the merger is intended to provide union members with the unity and resources necessary to battle employers in a global economy. To that end, the USW will have sufficient density within certain industries (i.e., steel) to place pressure upon employers by affecting their operations in multiple locations at one time.

Also, the USW is touted as a major political force with the goal of securing

worker-friendly legislation. Noting the potential political muscle of the new union, Howard Dean (Democratic National Committee Chair), Richard Gephardt (former Minority Leader of the U.S. House of Representatives) and John Sweeney (AFL-CIO President) spoke to the delegates at the merger convention.

Of course, such mergers also present concerns for workers. To some degree, smaller unions can lose their identity through a merger (e.g., the small component of health care workers within the USW). This can become problematic where the union represents competing products, e.g., steel and wood. Thus, some workers may find their influence diluted in a larger union, and they may find themselves dealing with a larger bureaucracy far removed from their daily concerns.

That being said, it would appear that, for the time being, this current merger trend will continue as a means of addressing declining membership and the globalization of the economy.

For more information, contact Maury Nicely of Miller & Martin at 423-785-8407 or at mnicely@millermartin.com.

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Lobbying Laws

administrative proceedings, including contested case hearings and rule makings. This exception would allow clients to retain lawyers who are members of the General Assembly to represent them in administrative proceedings. It also exempts representation in administrative proceedings from the disclosure requirements that apply to hiring state employees, or members of state boards.

Next Steps

The General Assembly will continue to wrestle with legislative process bills for the foreseeable future. Other pending bills might require disclosure of lobbying fees and expenditures, and ban lobbyist service on state regulatory boards. Some of these bills may yet afford lawmakers a second look at the more controversial provisions of this week’s act, including a late-added requirement that legislators disclose all sources-though not amounts-of household income over \$200. This provision, alone among all the disclosure requirements in the bill, carries no criminal penalty.

For more information, contact Tom Lee of Waller Lansden Dortch & Davis at 615-850-8478 or at tom.lee@wallerlaw.com.





State Supreme Court Clarifies Landfill Law

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On March 18, 2005, the Tennessee Supreme Court found that the “de novo review” required by the Jackson Law means that a trial court must exercise its independent judgment when reviewing a county commission’s decision on a landfill construction.

The Jackson Law requires local approval by a county legislative body before a new solid waste landfill may be constructed in Tennessee. In making this determination, the county commission must consider eight specific criteria. The Jackson Law states that judicial review of the county commission’s determination “shall be a de novo review before the chancery court for the county in which the landfill is proposed to be located.”

Although the statute clearly requires *de novo* review, a 1996 Court of Appeals decision created some confusion with its holding that de novo review under the Jackson Law meant that parties could present additional evidence upon judicial review, but the trial court could not substitute its own judgment for that of the county commission.

In a recent Tennessee Supreme Court case, Tennessee Waste Movers (TWM) sought to double the size of its existing landfill in the Matlock Bend Industrial Park in Loudon County, which would extend the life of the landfill by ten years. A developer of a golf community objected to the expansion and real estate experts testified about the economic effect the landfill would have on real estate values. Following a public hearing, the Loudon County Commission denied TWM’s request

because the expansion “would expose a planned golf community to the unsightly landfill, would adversely affect property values, and would negatively impact tax revenues.” TWM appealed to the chancery court.

The Chancellor considered evidence from the proceedings before the Loudon County Commission, as well as new evidence presented by the parties at trial. The Chancellor commented that he would have permitted the expansion because the proposed expansion would not produce offensive odors, could be screened from the development, and would cause fewer problems than existing operations in the industrial park.

Despite these statements, the Chancellor refused to replace the county commission’s determinations with his own judgment and denied TWM’s application. The Court of Appeals affirmed this decision.

In its review of the case, the Supreme Court found that “*de novo* review” under the Jackson Law requires that the chancery court must try the case “as if it had originated there.” No presumption of correctness attaches to the decision of the county commission, and the chancellor must substitute his own judgment for that of the

county commission. Both the administrative record and supplemental evidence may be introduced before the chancellor. The Supreme Court remanded the case back to the chancellor for reconsideration under the appropriate standard of review.

The impact of this Supreme Court opinion remains to be fully determined, but it is safe to presume that local chancery courts will play a critical role in the siting decisions for new solid waste landfills and expansions of landfills in the future. Because of the Supreme Court’s holding, the appeal of a county commission veto under the Jackson Law will be more like starting over than a review.

As a consequence, business should expect that the local chancery courts will end up making most of the Jackson Law decisions moving forward. One obvious consequence of the new Supreme Court decision might be action by the Tennessee General Assembly, although there is no indication at this time that the Legislature is considering a response.

For more information contact Scott Thomas or Greg Young of Bass, Berry & Sims PLC at 615-742-6200.

Check Your E-Mail!

The Tennessee Chamber sends news, announcements and publications through e-mail (as well as regular mail and by fax) to its members. E-mail is by far the fastest and most efficient means we have to communicate with you. If you have not been receiving regular e-mail messages from us (such as the weekly Capitol Update), please contact us at judy.haggard@tnchamber.org or at 615-256-5141 to give us your e-mail address or to be certain that we have the right address on file. Also, please be sure to check with your computer system administrator that the Chamber’s domain (tnchamber.org) is allowed to pass through your corporate firewall and is not labeled as “spam.”





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Streamlined Sales Tax Delayed

businesses. For delivery sales, the point of taxation under the new rule is shifted from the store location to the point of delivery. This results in a shift of revenue among local governments as well as a new requirement placed on Tennessee businesses to track and report delivery sales by taxing jurisdiction. States are creating and certifying “rates and jurisdiction databases” which will assist businesses in this process.

When the Agreement becomes effective, a centralized registration database will be available for sellers who wish to register to collect sales taxes in “streamlined” states. The states will certify service providers as well as certified automated systems that will assist sellers in the collection of sales taxes. States will publish a “taxability matrix” which will assist in determining taxability of Streamlined defined terms under the state’s law. A “no look back” amnesty period will be available for sellers who register under the Agreement as long as the seller has not been previously contacted by a state for audit. This amnesty period will last for one year after the effective date of the Agreement. A Governing Board consisting of Member States would also take effect at this time to oversee administration of the Agreement.

It is expected that enough states will petition for membership to the Agreement that a vote may be taken July 1, 2005. The Agreement becomes effective when 20 percent of states, levying a sales tax, conform their laws to the Streamlined Agreement. As an Associate Member, Tennessee’s population would count toward the 20 percent threshold if Tennessee receives a vote that it is in “substantial compliance” with the Agreement, except for its delayed effective date. If the vote threshold is achieved by Petitioning States, the Agreement would become effective on October 1, 2005.

The Streamlined system would be a voluntary system—in other words, states cannot mandate a remote seller to collect its tax. Because the issue that keeps the states from requiring a remote seller to collect its taxes is a federal Commerce Clause issue, either Congress would have to pass federal legislation endorsing the Streamlined Agreement and granting collection authority or the states would have to pursue court action to have the U.S. Supreme Court overturn an earlier court decision. While the Streamlined system is a voluntary system, the states are hopeful that amnesty provisions, as well as vendors’ compensation provisions for “certified service providers” will enhance efforts to have remote sellers collect sales taxes.

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Reducing Health Plan Costs

subrogation rights and procedures. Subrogation clauses in benefit plans should be reviewed to ensure that they allow a full recovery and do not exclude expenses incurred by the claimant, such as attorney fees. In addition, some courts have developed a default “make whole doctrine” in which the plan's right to subrogation of any proceeds a claimant recovers against a third party is limited to the extent that the recovered funds exceed the claimant's actual damages. Accordingly, each plan's subrogation clause should specifically state that subrogation applies without regard to the make whole doctrine.

Before paying benefits, plan sponsors can require a claimant to sign a separate subrogation agreement in which the claimant affirmatively recognizes the plan’s subrogation rights. If the claimant is potentially covered by another insurance policy, the plan sponsor should send a letter to the insurance company explaining the plan's subrogation rights. Similarly, if the plan sponsor becomes aware that the claimant has brought a lawsuit with respect to his or her injuries, the plan sponsor should send letters to both the plaintiff’s and defendant's attorneys informing them of the plan's subrogation rights.

All letters should demand that the plan be paid before the claimant. If a company has outsourced the enforcement of its subrogation rights, it should contact its third-party administrator at least annually to check on the administrator’s procedures for enforcing those rights.

For more information, contact Sean Sullivan of Waller Lansden Dortch & Davis at 615-850-8584 or at sean.sullivan@wallerlaw.com.



Calendar

Thank You Scholars Partners!

In partnership with the Tennessee Chamber of Commerce & Industry, Maytag Cleveland Cooking Products and Cleveland State Community College (CSCC) proudly announce "Earn & Learn." Earn & Learn is a community initiative developed through the Tennessee Scholars Program that provides a unique opportunity for graduates of high schools in the Cleveland area to attend CSCC through either a full scholarship or a tuition reimbursement plan while working full or part-time at Maytag Cleveland Cooking Products.

We appreciate the commitment of KraftCPAs PLLC, Cleveland Cooking Products and Cleveland State Community College for recognizing the importance and advantages of the Scholars Program.

The Tennessee Scholars Program is a Tennessee Chamber-led and business community-driven initiative that encourages high school students to take a more rigorous course of study to be better prepared for college or the workforce after graduation.

If you would like information, please contact the Tennessee Scholars Program Director Ruth Woodall at ruth.woodall@tnchamber.org or at 615-256-5141.

2005 Dates to Remember

May 4	Safety Programs	Jackson, Holiday Inn
May 6	Forklift Training	Cleveland, Eaton Electrical
May 17	TOSHA 101	Nashville, Associated Builders & Contractors
May 19	Safety Programs	Knoxville, University Conference Center
May 24	TOSHA 101	Jackson, Holiday Inn
May 26	TOSHA 101	Morristown, Holiday Inn
June 7-10	30-Hour OSHA	Crossville, Fairfield Glade



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