

**MULTISTATE SALT ISSUES
AND
BUSINESS MIGRATION**

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BRINGING A BUSINESS TO TEXAS: SALT AND FORMATION / TRANSITION ISSUES

I. BACKGROUND

In 2021, more than 500,000 people relocated to Texas for the seventh year in a row, according to the 2021 Texas Relocation Report, which is based on information compiled by Texas Realtors from the U.S. Census Bureau.¹

Elon Musk moved the headquarters of Tesla and The Boring Company from California to Texas. This is an ongoing trend. According to the Census reports, 4.2 million people have moved to Texas since the prior census in 2010, which is a growth of 16.4%, and places Texas just behind the 17.4% population growth rate of Utah.²

Businesses have moved from California, Florida, Illinois, New York and Oregon over the time frame from 2019 through the current year, with the vast majority of business relocating from California to Texas. The most popular destinations have been Austin, Dallas, Houston, and Fort Worth, with Austin being the most popular.

Americans are relocating to Texas for a variety of reasons, many of which include: a friendly business climate, an expanding job market, talented employees, a cheaper (relatively) cost of living, lower taxes, less overall regulation, and downright friendly residents.

Many of Texas' newest residents are business owners and when the individual relocates, their business follows suit. With careful planning, businesses relocating to Texas can sever ties with their former state and avoid nexus creating activities in the former state resulting in less regulatory and compliance headaches and lower taxes. Given the population trends, Texas attorneys have a unique opportunity to represent our newest resident business owners and assist with the domestication of their business entities into Texas.

II. WHAT DOES IT MEAN TO RELOCATE?

What does it mean to relocate to Texas? Is moving one's headquarters enough? What about employees who want to stay with the company and still work remotely? What if the business still owns property in the state? What impact does that have on registration and state tax responsibilities?

III. REGISTRATION REQUIREMENTS

A. Secretary of State

The Texas Secretary of State imposes different registration requirements on a business conducting

activity in Texas than the Texas Comptroller's office imposes on taxpayers engaged in business.

Section 9.001 of the Texas Business Organizations Code ("BOC") requires the following types of foreign entities to file an application for registration with the Texas secretary of state if the entity is "transacting business" in Texas:

- corporations;
- limited partnerships;
- limited liability partnerships;
- limited liability companies;
- business trusts;
- real estate investment trusts;
- cooperatives;
- public or private limited companies;
- any other foreign entity that, if formed in Texas, would be formed as a corporation, limited partnership, limited liability company, professional association, cooperative, or real estate investment trust; and
- any other foreign entity that affords limited liability under the law of its jurisdiction of formation for any owner or member.³

B. Formation in Texas

Formation of business entities in Texas include, for Secretary of State purposes:

- For-Profit Corporations
- Non-Profit Corporations
- Professional Corporations
- Professional Associations
- Limited Liability Companies
- Professional Limited Liability Companies
- Limited Partnerships
- Uniform Unincorporated Nonprofit Associations.
- any other foreign entity that, if formed in Texas, would be formed as a corporation, limited partnership, limited liability company, professional association, cooperative, or real estate investment trust; and
- any other foreign entity that affords limited liability under the law of its jurisdiction of formation for any owner or member.⁴

C. Registering with the Comptroller

Business entities coming to Texas are required to complete a Sales and Use Tax Permit application if:

- engaged in business in Texas; and

¹ Prodigy News: Key Reasons Why Millions are Moving to Texas (May 21, 2021), available online at: <https://apnews.com/article/texas-business-census-2020-science-0d436b250dc07111bffa4b4f6cdd6682b>.

² *Id.*

³ https://www.sos.state.tx.us/corp/foreign_outofstate.shtml

⁴ https://www.sos.state.tx.us/corp/forms_boc.shtml

- selling or leasing tangible personal property in Texas; or
- selling taxable services in Texas.⁵

A sales tax permit is required for each place of business in Texas. Rule 3.334(a)(16) defines “Place of Business” as “[a]n established outlet, office, or location operated by a seller for the purpose of selling taxable items to those other than employees, independent contractors, and natural persons affiliated with the seller, where sales personnel of the seller receive three or more orders for taxable items during the calendar year. The term does not include a computer server, Internet protocol address, domain name, website, or software application.”

Additional criteria apply for determining when a location is a place of business of the seller for distribution centers, manufacturing plants, storage yards, warehouses and similar facilities; kiosks; and purchasing offices.

The Comptroller can disregard places of business established for tax avoidance purposes. “An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business, is not a place of business of the seller if the Comptroller determines that the outlet, office, facility, or location functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or exists solely to rebate a portion of the tax imposed by those chapters to the contracting business. An outlet, office, facility, or location does not exist to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or solely to rebate a portion of the tax imposed by those chapters if the outlet, office, facility, or location provides significant business services, beyond processing invoices, to the contracting business, including logistics management, purchasing, inventory control, or other vital business services.”

Engaged in business means for sales tax:

- Having a temporary or permanent location in Texas operated directly or through an agent. (e.g. *a kiosk, office, distribution center, sales room, sample room, warehouse, storage place or any other physical location.*)
- Having an employee or representative in Texas to sell, deliver or take orders for taxable items. (e.g. *agents, canvassers, or solicitors operating under your authority to conduct business in Texas; independent salespersons operating on behalf of direct sales companies; employees who exhibit*

products at trade shows or conferences; affiliates or related businesses that accept returns in Texas.)

- Performing services using company employees, authorized service agents or subcontractors in Texas.
- Promoting a flea market, arts and crafts show, trade day, festival or other event selling taxable items services in Texas.
- Leasing equipment or other tangible personal property to others in Texas.
- Owning or using tangible personal property (including computer software) in Texas.
- Delivering items using owned, leased or company vehicles in Texas.
- Allowing a franchisee or licensee to operate under a trade name. The franchisee or licensee is required to collect sales and use tax in Texas.
- Forming, organizing or incorporating a business in Texas for which internal affairs are governed by Texas law.
- Soliciting in Texas
 - orders for taxable items by mail or online; or
 - sales of taxable items through catalogs, periodicals, advertising flyers or other advertising, or by radio, television, telephone, or other communication system.
- Having at least a 50 percent ownership interest in, or being owned at least 50 percent by, another entity who maintains in Texas
 - a distribution center, warehouse or similar location and delivers taxable items sold to purchasers;
 - a location from which business is conducted that sells substantially similar products and sells those products under a substantially similar business name; or
 - location from where business is conducted that uses its facilities or employees to promote sales or intends to establish or maintain a marketplace, including receiving or exchanging returned merchandise.
- Conducting business in any other manner in Texas. Additionally, sales and use tax responsibility is established in Texas if either of the following apply:
 - Remote Sellers. A remote seller generates total Texas revenue greater than \$500,000 in the preceding 12 calendar months.
 - Remote Marketplace Providers. A remote marketplace provider with total Texas revenue

⁵ <https://comptroller.texas.gov/taxes/permit/>

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