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Thinking beyond borders: Management of extended business travelers - United States

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Key message

The steady advance of cross-border business, which affects every sector of the economy, has a human dimension. Whether it is to research new markets and business opportunities, negotiate new contracts, attend meetings and trainings, sell, and move products and services, or simply maintain links in important markets, many American multinational organizations have come to rely upon internationally mobile employees, often known as extended business travelers.

Extended business travelers are employees who travel to work abroad for short periods of time, but are not on a traditional international assignment, so are able to keep close ties to their homes, families, and home-country/territory offices. Business travel of this type can give rise to a variety of issues—tax compliance, risk-related, and others—for their organizations. In particular, it can be very difficult to keep track of precisely where the employees are, what they are doing there, and how much time they have spent in that host location—and this gets more complicated if the business trip includes numerous countries. Consequently, reporting and paying taxes in the U.S. as well as ensuring proper compliance with U.S. and other countries/territories' immigration rules and labor laws can be quite challenging. In this chapter, we highlight the many significant concerns and issues that come with the cross-border movements of extended business travelers into and from the United States.

1 Key message

Extended business travelers can give rise to a variety of issues—tax compliance, risk-related, and others—for their organizations. In particular, it can be very difficult to keep track of precisely where the employees are, what they are doing there, and how much time they have spent in that host location.

02
Income tax

2 Income Tax

2.1 Liability for income tax

A person's liability for U.S. tax is determined primarily by residence status. A person can be a resident, nonresident, or "dual status" (i.e., both resident and nonresident within the same tax year) for U.S. tax purposes.

Residents are generally taxed on their worldwide income regardless of where the income is derived.[1] This includes all compensation regardless of where or for whom the services are performed, or whether the compensation consists of cash, property, or services received.[2]

Nonresidents are subject to U.S. tax on income from U.S. sources.[3] United States-source income that is not effectively connected with a U.S. trade or business, such as investment income, is taxed on a gross basis (i.e., without the benefit of deductions) at a flat 30-percent rate, unless a lower treaty rate applies.[4] A nonresident engaged in a trade or business within the United States during the tax year is taxed on income effectively connected with the U.S. trade or business, less allowable deductions, at normal graduated rates.[5] Generally, income effectively connected with a U.S. trade or business includes compensation for personal services performed in the United States.[6]

A foreign national who changes from U.S. resident status to nonresident status or from nonresident to U.S. resident status during a year is subject to U.S. tax as if the year were divided into two separate periods, one of residence and one of nonresidence.[7] In general, the dual status foreign national is subject to tax on worldwide income for the period of residence, but only on U.S.-source income for the period of nonresidence.[8]

Extended business travelers may be considered residents or nonresidents of the United States for tax purposes, depending upon their travel patterns and other factors.

How is residency determined?

As a general rule, a foreign citizen is treated as a nonresident for U.S. tax purposes unless they qualify as a resident. A resident is an individual who is a lawful permanent resident of the United States (the "Green Card" test), or who meets the "substantial presence" test.[9]

Green Card test

A lawful permanent resident is an individual who has been officially granted the right to reside permanently in the United States.[10] These individuals are often referred to as Green Card holders. For an individual who meets only the Green Card test, residence generally begins on the first day of the year on which the individual is physically present in the U.S. as a lawful permanent resident and will generally cease on the day this status officially ends.[11]

Substantial presence test

A person who meets the substantial presence test is one who has been physically present in the United States for at least 31 days in the current calendar year and has at least 183 days of presence counting all the days of physical presence in the current year, one-third of the days in the first preceding year, and one-sixth of the days in the second preceding year.[12] In general, a partial day in the U.S. is counted as one full day.

Example

Jonathan, a U.K. national, is present in the United States for 130 days during Year 3 (the current year), 120 days during Year 2, and 120 days during Year 1. He is not a Green Card holder. Jonathan is a U.S.

resident for Year 3 because he is present in the United States on at least 31 days in Year 3 and on more than 183 equivalent days during the applicable three-year period, computed as follows:

Year	Actual Days	Equivalent Days
Year 3	130 x 1	130
Year 2	120 x 1/3	40
Year 1	120 x 1/6	20
		190

Days on which an individual is in the United States as an exempt individual do not count for purposes of the substantial presence test.[13] An exempt individual includes anyone temporarily present in the U.S. as a foreign government-related individual, a teacher or trainee who holds a J or Q visa, or a student holding an F, J, M, or Q visa.[14] (There are conditions to qualify for the exempt-individual exception, such as the length of time the visa is held.)

An individual who would otherwise meet the substantial presence test can be treated as nonresident if the "closer connection" exception is met. Under the closer connection exception, during the current year, the person must (1) be present in the U.S. for fewer than 183 days, (2) maintain a tax home in a foreign country/territory, and (3) have a closer connection to a single foreign country/territory in which the individual maintains a tax home than to the United States.[15] Both the "tax home" and "closer connection" determinations are factual and are, therefore, subject to some degree of uncertainty. We recommend that an individual who seeks to qualify for one of these exceptions speak to a tax adviser to obtain the proper advice.

Residence under the substantial presence test generally begins on the first day during the year in which the person is physically present in the United States.[16] Likewise, an individual generally will cease to be a resident following the last day of physical presence in the U.S. provided certain conditions are met.

A period of up to 10 days of presence in the U.S. may be excludible for the purpose of determining a person's residency start or termination date; those days of presence will be counted, however, for the purpose of determining whether the 183-day component of the substantial presence test has been met.[17]

2.2 Tax trigger points

In a limited number of situations, individuals working in the U.S. may be exempt from liability to pay U.S. tax. These include a limited exception for short-term business visitors (discussed below), certain treaty exemptions, and exemptions available to F, J, M, or Q visa holders paid by a foreign employer. In general, an individual with compensation from services performed in the United States will be required to file a U.S. tax return and pay U.S. tax, unless an exception applies.

Under a statutory exception for short-term business visitors, if a nonresident is in the U.S. for 90 days or less during a year, performs services for a foreign employer that is not engaged in a U.S. trade or business, and earns USD 3,000 or less for such U.S. services, the compensation is not subject to U.S. tax.[18]

Many income tax treaties provide more generous exemptions from U.S. tax for income earned by nonresident aliens who are present in the United States for short periods (generally up to 183 days during either a tax year or any 12-month period, depending on the treaty).[19]

A direct charge-back of a foreign employee's compensation to a U.S. company could cause the loss of the treaty exemption.

To the extent that the employee qualifies for such relief under an applicable income tax treaty, there will be no U.S. tax liability. However, certain filing obligations must be met to substantiate the claim to treaty relief.

2.3 Types of taxable income

For extended business travelers who are nonresidents, the types of income that are generally subject to U.S. tax are compensation for employment or self-employment, other U.S.-source income, and gains from disposition of U.S. assets (such as real estate).

If an individual is in the United States for a temporary assignment, certain "away-from-home" expenses such as travel, meals, and lodging may be deductible (or, if reimbursed by the employer under an accountable plan, the reimbursements may be excluded from income).[20] The expenses must be (1) ordinary and necessary, (2) incurred in pursuit of a trade or business, and (3) incurred while "away from home."[21] To be treated as away from home, the individual must be temporarily away from their principal place of employment (or, if no principal place of employment, their regular place of abode).[22]

An individual will not be treated as being temporarily away from home during any period of employment if that period exceeds 1 year.[23] This includes any period of employment in a single location that exceeds 1 year. Thus, when the individual's period away from home is (or is expected to be) more than 1 year at a single location, any away-from-home living expenses paid or incurred are not deductible.

The Internal Revenue Service (IRS) has clarified that the standard for determining whether an assignment is temporary is the employee's "realistic expectation" regarding the assignment's duration, both at its commencement and upon the occurrence of a change in circumstances, as well as the actual assignment length.[24] Repeated trips to the same location may be characterized as one assignment.

If any reimbursement exceeds an employee's substantiated expenses, the employer must report the excess amount as compensation, and the amount is includible in the employee's income.

It is advisable that companies adequately document that an employee's assignment is (or is not) initially expected to last 1 year or less; but also, when the assignment is extended beyond 1 year, that should be documented too.

2.4 Tax rates

There are four types of tax status that may apply to a U.S. resident:

- Married filing jointly
- Married filing separately
- Single
- Head of household (a single person with a dependent in the home).

Each filing status is subject to a different graduated tax rate scale.[25]

As previously mentioned, the United States recently enacted changes to its tax laws. One significant change is the rate structure at which individuals are taxed.

The rate structure has seven rates: 10 percent, 12 percent, 22 percent, 24 percent, 32 percent, 35 percent, and 37 percent. For 2024, the maximum tax rate of 37 percent applies to income over USD 731,200 for married taxpayers filing jointly, USD 609,350 for unmarried taxpayers, and USD 365,600 for married taxpayers filing separately.[26] These thresholds are adjusted annually for inflation.

A nonresident is subject to tax at the graduated rates on income effectively connected with a U.S. trade or business, such as compensation for services rendered in the United States.[27] A 30-percent flat tax (or lower treaty rate) applies to U.S.-source income not effectively connected to a U.S. trade or business, such as U.S.-source dividend income, certain interest, and royalty income.[28]

The filing statuses generally available to nonresidents are married filing separately and single.[29]

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Social Security

3 Social Security

3.1 Liability for social security

Social security tax, often called "FICA" because it was established by the Federal Insurance Contributions Act, is imposed on both the employer and employee.[30] FICA is assessed on wages paid for services performed as an employee within the United States, regardless of the citizenship or residence of either the employee or employer, and regardless of the duration of the work assignment in the U.S.—meaning that a business traveler is subject to FICA beginning on their first workday in the United States.[31]

FICA is also due on wages paid for services performed outside the United States by a U.S. citizen or resident for an American employer. The employee portion of the tax may not be deducted in computing U.S. income tax. U.S. citizens or residents working outside the U.S. may also be subject to FICA under the following special circumstances:

- They work for a foreign affiliate of an American employer that has entered into a binding agreement with the IRS, or
- They are performing services for a foreign employer in connection with a contract between the U.S. government (or instrumentality thereof) and any member of a U.S.-controlled group of entities that includes the foreign employer.[32]

FICA consists of two parts, the old-age, survivors, and disability insurance tax (OASDI) and Medicare tax.[33]

OASDI at the rate of 6.2 percent is imposed on both the employer and the employee on wages up to USD 160,200 for 2023 (the amount is adjusted annually for inflation).[34] In addition, Medicare tax at the rate of 1.45 percent is imposed on both the employer and employee on all wages, without a cap.[35] In addition, employees must pay an additional Medicare tax at the rate of 0.9 percent on wages in excess of a threshold determined by their filing status. The thresholds are USD 250,000 for married taxpayers filing jointly (applied to the combined wages of the two spouses), USD 125,000 for married taxpayers filing separately, and USD 200,000 for single taxpayers and heads of households.[36]

A foreign national employee may be exempt from FICA pursuant to a totalization agreement between the U.S. and the employee's home country/territory.[37] Totalization agreements eliminate dual coverage and contributions for foreign nationals working in the U.S. for limited time periods. The United States has entered into totalization agreements with the following 30 countries/territories as of 1 January 2024.[38]

Australia	Germany	Poland
Austria	Greece	Portugal
Belgium	Hungary	Slovak Republic
Brazil	Iceland	Slovenia
Canada	Ireland	South Korea
Chile	Italy	Spain
Czech Republic	Japan	Sweden
Denmark	Luxembourg	Switzerland
Finland	The Netherlands	United Kingdom
France	Norway	Uruguay

The United States has a totalization agreement pending approval with Romania.

In addition, some nonresident visa holders (specifically, F, J, M, and Q visa holders) may qualify for exemption from FICA.[39]

04
Compliance obligations

4 Compliance obligations

4.1 Employee compliance obligations

Tax returns are generally due by April 15 of the year following the end of the tax year to which the return relates, or June 15 in the case of a U.S. citizen or green-card holder who resides outside the United States on April 15.[40] However, if April 15 falls on a weekend or on a legal holiday, tax returns for that tax year are due on the next business day.[41]

The time for filing can be automatically extended to October 15 by filing IRS Form 4868.[42] The time for payment of tax, however, cannot be extended.

A nonresident who has compensation subject to withholding must file an income tax return on or before April 15.[43] In the case where the nonresident does not have compensation subject to income tax withholding, the tax return is due by June 15.[44] Nonresidents can also claim extensions of time to file their returns by filing Form 4868.[45]

Nonresidents generally must file income tax returns on time to be permitted to claim deductions.[46] In addition, taxpayers who claim the benefits of treaty provisions are generally required to disclose this position on the tax return for the tax year (unless a specific exception applies).[47] Failure to make this disclosure could lead to substantial penalties.

4.2 Employer reporting and withholding requirements

Residents are subject to withholding of income tax on wages paid by their employers.[48] Wages include cash and non-cash payments for services performed by an employee for the employer, unless an exception applies.[49] Residents are also subject to withholding of U.S. social security and Medicare tax ("FICA") on all compensation.

Nonresidents are subject to withholding of income tax on wages paid by their employers for services performed in the U.S. (that is, income effectively connected with a U.S. trade or business).[50]

A nonresident may also be subject to withholding on U.S.-source income that is not effectively connected with a U.S. trade or business (generally, investment income).[51] The withholding rate is 30 percent imposed on gross income, unless lowered by an applicable treaty.[52] Nonresidents are also subject to withholding of FICA on any compensation that is related to service provided in the United States, unless a bilateral social security agreement (see discussion above) provides an exception.

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Immigration

5 Immigration

5.1 Work permit/visa requirements

Generally, foreign nationals must obtain a visa prior to entering the United States to work. The type of visa required will depend on the purpose of the individual's entry into the United States.

Foreign nationals generally must obtain visas at American embassies and consulates to enter the United States. A waiver of the visa requirement is available to nationals of many developed countries/territories if a trip is brief and for tourism or non-employment business purposes.

Information on visas and other travel/work documentation requirements can be obtained from a U.S. embassy or consulate in the individual's jurisdiction or by visiting the U.S. Department of State web site.

Different visa categories apply to different employment relationships; therefore, it is recommended that individuals seek professional assistance from a specialist such as immigration counsel or qualified global mobility professionals.

The following is a non-exhaustive list of the most common employment-based non-immigrant U.S. visa categories.

F-1	Academic student visa—for on-campus employment and designated school official (DSO) authorized curricular practical training
TN	Allows citizens of Canada and Mexico, as professionals to work in the United States in prearranged business activities for U.S. or foreign employers under the USMCA (previously NAFTA) trade agreement between the United States, Canada and Mexico.
H-1B	Status allows for foreign professionals sponsored by a U.S. employer to work in a specialty occupation
J-1	Visa for individuals participating in work and study based on approved exchange visitor programs
L-1	Temporary work visa for intra-company transferee

06
Other issues

6 Other issues

6.1 Double taxation treaties

In addition to the domestic tax laws of the United States that provide relief from international double taxation, the U.S. has entered into income tax treaties with more than 65 countries/territories to mitigate double taxation and allow cooperation between the U.S. and overseas tax authorities in enforcing their respective tax laws.

6.2 Permanent establishment implications

There is the potential that a permanent establishment could be created in the host location as a result of extended business travel, but this would depend on a number of factors including the type of services performed, the level of authority the employee has, the duration of presence in the host country/territory, etc., discussion of which is beyond the scope of this publication.

6.3 Indirect taxes

The United States does not impose a value-added tax (VAT). No sales tax is imposed at the federal level. Most states and many localities impose a sales tax on various goods and services. A few states do not impose a sales tax; for those that do, rates vary from less than 3 percent to more than 10 percent. The definition of a taxable sale or service varies from jurisdiction to jurisdiction.

6.4 Transfer pricing

The United States has a transfer pricing regime. Transfer pricing implications could arise when the employee is being paid by an entity in one jurisdiction but performing services for the benefit of a related entity in another jurisdiction. How a proper reimbursement between the entities is calculated depends on the nature and complexity of the services performed.

6.5 Local data privacy requirements

Data privacy rules in the U.S. arise from a collection of federal, state, and industry case law, statutes, and practices. There is no independent oversight agency in the United States.

6.6 Exchange control and reporting of assets

Generally, no restrictions are imposed on bringing money into or out of the United States. Transfers of currency or monetary instruments of more than USD 10,000 in a single transaction, however, must be reported to the U.S. Department of the Treasury on FinCEN Form 105, Report of International Transportation of Currency of Monetary Instruments.[53] This report is not required if the transfer occurs through normal banking channels. If, however, a "listed" country/territory or entity is involved, then there can be extensive embargoes, sanctions, record-keeping, and other restrictions of the flow of funds. The U.S. Treasury and the Office of Foreign Assets Control maintain the list of countries/territories and entities.

U.S. citizens and residents are required to report on an annual basis if they own or have signature authority over accounts located outside the U.S. that have a combined value of over USD 10,000 at any time during the year.[54] This report is filed on FinCEN Report 114, Report of Foreign Bank and Financial Accounts (commonly referred to as "the FBAR"), with the Department of the Treasury.[55] The due date coincides with that for income tax returns, i.e. 15 April, with an automatic 6-month extension available.[56]

This form is not filed with the annual income tax return filed that is submitted to the IRS; rather it must be filed electronically with the U.S. Treasury Department.[57]

Furthermore, U.S. citizens and residents who have interests in foreign financial accounts that exceed a certain threshold amount must disclose certain information about those assets on IRS Form 8938, Statement of Specified Foreign Financial Assets, with their annual income tax returns.[58]

Significant penalties apply for failing to file the FBAR or Form 8938, if required, so it is important to be aware of these rules.[59]

6.7 Non-deductible costs for business travelers

Some business travelers may find the U.S. definition of gross income broad, and the number of allowable deductions limited when compared to their home countries/territories. U.S. taxation of retirement-focused funds and deductibility (or lack thereof) of moving expenses are two areas where individuals and their employers may notice significant differences in treatment.

For example, U.S. resident employees who participate in certain non-U.S. pension plans may be taxed in the U.S. on distributions from the plans and may also be taxed on the vested accrued benefits within the plans. In addition, the employee may not be able to deduct current contributions to a non-U.S. pension plan unless relief is available under a treaty. Likewise, income from a social security plan received by a U.S. resident may be taxable in the U.S., depending upon provisions in applicable income tax treaties.

Due to a recent change in the law, the deductibility of moving expenses has been suspended. For tax years 2018 through 2025, moving expenses are not deductible.[60]

There are many other items that the U.S. considers to be taxable income, or disallows as deductions, that may significantly differ from the person's home country/territory rules. It is recommended that those who have worked in the U.S. for any period of time seek professional assistance with their U.S. federal, state, and local tax obligations.

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Footnotes

[1] I.R.C. §§ 1, 61.

[2] I.R.C. § 61(a)(1); Treas. Reg. § 1.61-2(a).

[3] I.R.C. § 872.

[4] I.R.C. § 871(a); Treas. Reg. § 1.871-12.

[5] I.R.C. § 871(b).

[6] I.R.C. §§ 871(b), 864(b).

[7] Treas. Reg. § 1.871-13(a)(1).

[8] Treas. Reg. § 1.871-13(a)(1).

[9] I.R.C. § 7701(b)(1).

[10] I.R.C. § 7701(b)(6).

[11] I.R.C. § 7701(b)(2)(A)(ii), (b)(2)(B).

[12] I.R.C. § 7701(b)(3)(A).

[13] I.R.C. § 7701(b)(3)(D)(i).

[14] I.R.C. § 7701(b)(5).

[15] I.R.C. § 7701(b)(3)(B); Treas. Reg. § 301.7701(b)-2(a).

[16] I.R.C. § 7701(b)(2)(A)(iii).

[17] I.R.C. § 7701(b)(2)(C); Treas. Reg. § 301.7701(b)-4(c)(1).

[18] I.R.C. § 861(a)(3).

[19] See, e.g., U.S. Model Income Tax Treaty (2006), art. 14(2).

[20] I.R.C. § 162(a)(2).

[21] Ibid.

[22] Ibid.; Rev. Rul. 93-86.

[23] Ibid.

[24] Rev. Rul. 93-86.

[25] I.R.C. § 1(a)-(d), I.R.C. § 1(j).

[26] Rev. Proc. 2021-45.

[27] I.R.C. § 871(b).

[28] I.R.C. § 871(a).

[29] I.R.C. § 2(b), (d).

[30] I.R.C. §§ 3101, 3111.

[31] I.R.C. § 3121.

[32] I.R.C. § 3121(l)(1).

[33] I.R.C. §§ 3101, 3111.

[34] I.R.C. §§ 3101(a), 3111(a).

[35] I.R.C. §§ 3101(b)(1), 3111(b).

[36] I.R.C. § 3101(b)(2).

[37] I.R.C. §§ 3101(c), 3111(c).

[38] See U.S. International Social Security Agreements at https://www.ssa.gov/international/agreements_overview.html.

[39] I.R.C. § 3121(b)(19).

[40] I.R.C. § 6072(a); Treas. Reg. §§ 1.6072-1(a)(1), 1.6081-5(a).

[41] Treas. Reg. § 301.7503-1(b).

[42] I.R.C. § 6081(a); Treas. Reg. § 1.6081-4(a), (b).

[43] I.R.C. § 6072(a); Treas. Reg. § 1.6072-1(c).

[44] I.R.C. § 6072(c); Treas. Reg. § 1.6072-1(c).

[45] Treas. Reg. § 1.6081-4(a).

[46] I.R.C. § 874(a).

[47] I.R.C. § 6114(a).

[48] I.R.C. § 3402(a)(1).

[49] I.R.C. § 3401(a).

[50] Treas. Reg. § 31.3401(a)(6)-1(a).

[51] I.R.C. § 1441(a).

[52] I.R.C. § 1441(a).

[53] 31 CFR §1010.340.

[54] 31 U.S.C. § 5314; 31 C.F.R. § 1010.350.

See IRS FBAR Informational webpage at http://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] I.R.C. § 6038D(a).

[59] I.R.C. § 6038D(d); 31 U.S.C. § 5321(a)(5).

[60] I.R.C. § 217(k).

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