Short-term business travelers to the United States

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Short-term business travel to the United States

Short-term business travelers (STBTs) who are foreign nationals coming to the United States often trigger unexpected tax and reporting obligations for themselves and their employers. Such travelers are generally employees working in the United States for a short period of time who continue to maintain tax residency in their home jurisdiction, where they hold strong ties. These obligations can place significant administrative and tax burdens on multinational companies that may be unaware of their exposure to penalties and other regulatory risks. To minimize the costs associated with conducting business in the United States, it is imperative that employers and employees be aware of the tax implications associated with working in the United States.

Tax residency

Foreign nationals in the United States are generally considered nonresidents and thus are taxed only on income from U.S. sources until they meet one of the tests to be considered a U.S. resident. Inbound employees who meet one of the tests to qualify as U.S. resident aliens are generally taxed on their worldwide income without regard to the source of the income (with exceptions).

Absent a specific exception, a foreign national will be considered a U.S. resident alien for tax purposes in the calendar year if the individual is a Green Card holder or meets the substantial presence test (SPT). The SPT is based on presence days spent in the United States over a three-year period. These days do not have to be associated with a work-related purpose, and may be personal in nature.

An individual meeting SPT could still be considered a U.S. nonresident under the "closer connection exception" provided his/her presence in the United States was less than 183 days in the current year and he/she maintains a foreign tax home and has a closer connection to the foreign tax home.

Even if the individual exceeds 183 days, he/she may still qualify to be treated as a U.S. nonresident provided he/she is a resident of a country that has a tax treaty with the United States that contains a provision for determining residency.

Maintaining documentation for STBTs

We advise employers to maintain records of employee travel and be able to show U.S. tax authorities that they are compliant with all tax obligations regarding business travelers. Employers and employees may be able to use the Department of Homeland Security's I-94 website to obtain copies of entry/exit dates to and from the United States.

Immigration

Internal immigration controls should be in place to ensure that STBTs are only carrying out business activities permitted by their visa or work permit status in order to avoid putting the business at risk. Border controls globally are becoming more stringent, which engenders a greater risk of noncompliance.

Income tax

An individual's tax liability will be dependent upon his/her tax residency status. Even if the inbound employee manages to avoid U.S. residency status, he/she may trigger a tax liability as a nonresident individual engaged in a U.S. trade or business during the year. While some individuals believe that they are exempt from U.S. tax if they are in the United States less than 90 days, this exemption also requires the individual to receive less than $3,000 of income connected to days worked while in the United States and to be an employee of a foreign employer.

A U.S. nonresident employee may file his/her U.S. return under a single or married filing separately status and would be generally subject to U.S. graduated rates unless exempt from U.S. taxation. U.S. tax returns are generally due by April 15. However, the taxpayer may extend the date for filing (but not payment) to October 15.

Payroll considerations

It is easy to inadvertently trigger the thresholds that require an employer to withhold tax on their STBTs entering the United States. Based on U.S. tax source rules, income earned from days spent while physically working within the U.S. will be considered U.S. sourced income (absent treaty relief). U.S. sourced wages (cash and non-cash payments) are subject to withholding regardless of the nationality of the employee, residence of the employer or the intent of the assignment, unless an exception can be claimed.

In addition to the federal income tax withholding requirements, there are additional types of withholding requirements imposed on employers who send employees to the United States; employers may be required to run payroll and withhold tax in the United States to fulfill these obligations

These obligations may include state and local income tax withholding, Social Security withholding, Medicare withholding, as well as withholding for federal and state unemployment taxes.

Without sufficient due diligence regarding withholding and reporting obligations, an employer can easily expose itself to penalties due to (but by no means limited to) the failure to make deposit of taxes or to file correct payee statements, as well as accuracy-based penalties due to negligence. In addition, the employee can also be exposed to penalties for the failure to file and pay income tax, and failure to file correct information returns.

Substantial presence test

In order to meet SPT, the person must be physically present in the United States on at least 31 days during the current calendar year and 183 days during the three-year period.

This period includes all of the days that the individual was present in the United States in the current year, plus one-third of the presence days in the United States in the preceding year, plus one-sixth of the presence days in the United States in the year before that. A partial day in the U.S. would count as a full day.

Nonresident alien individuals who are generally considered U.S. tax residents under SPT may be able to avoid U.S. tax residency under certain exceptions/treaties.

Individuals holding certain visa types (F, J, M or Q) may be exempt from counting days under SPT provided certain requirements are met.

Transfer pricing

In situations where individuals are generating profit through the activities being undertaken on short-term travel in the United States, the organization may need to apply a transfer pricing methodology to recognize any attributable revenue and expenses.

U.S. State taxation

Each U.S. state operates within its own set of rules; thus, nonresident employees conducting business across multiple U.S. states could potentially trigger numerous state filing obligations given that state possesses a unique threshold for determining when a nonresident filing obligation exists.

It is vital to recognize that many state and local governments do not recognize income tax treaties that other countries may have established with the federal government. Thus, treaty exemptions may not be available to exempt income from state taxation. Certain state payroll audits have become increasingly common, as nonresident withholding compliance is an area that states have found to be commonly overlooked.

Social Security and Certificates of Coverage

Social Security coverage is required for all employees performing services within the United States, regardless of the duration of the employees' stay. However, the United States has totalization agreements in place with certain countries that allow for both the employee and employer to be exempt from U.S. social taxes (FICA).

If such a totalization agreement is in place, the foreign employer would apply for a certificate of coverage from the home country in order to document the exemption from U.S. social taxes. The United States does not provide any minimum exception from applying for the certificate of coverage.

Certain nonresident visa holders (i.e., F, J, M and Q visa holders) may be eligible for an exemption from paying FICA, subject to limitations regarding the duration of stay in the United States and the nature of the work in accordance with their visa.

After obtaining a copy of the certificate, the employer should maintain this document in the company's files in the event that the United States requests that evidence be presented in the future.

Notably, totalization agreements do not typically relieve withholding obligations for U.S. unemployment tax purposes. Employers may be required to implement unemployment tax withholding and remit taxes to every U.S. taxing jurisdiction that employees travel to and conduct business in.

Checklist for managing risks of noncompliance

Payroll tax exposure: Payroll compliance should be monitored by the company. Certain state payroll audits have become increasingly common. It is advisable to have an employee agreement in place documenting the length of the employee's U.S. short-term travel.

Immigration risks: It is imperative that STBTs adhere to immigration laws globally. Any visa/work permit requirements should be identified prior to traveling to the other jurisdiction.

Corporate tax risks: The employee's activities in the host country can create tax filing and payment obligations at the corporate level. The applicable income tax treaty should be reviewed, as a mitigation strategy may need to be put in place.

State nexus risks: U.S. states have their own rules for creating a taxable presence or nexus. A STBT may create a nexus in the state depending on the business activities conducted.

Regulatory risks: Local requirements must be considered to reduce the possibility of triggering any regulatory issues in the host country.

Reputational risks: There is increased pressure on multinationals to show that they have a process in place for monitoring STBTs and managing risks of noncompliance.

Away-from-home expenses

Typically, employers will pay or reimburse the travel expenses incurred by their employees while away from home. If the expenses are ordinary, necessary, relate to short-term business travel and are reimbursed under an accountable plan, they will generally not be included in the employee's taxable compensation for U.S. tax purposes. However, depending on a multitude of factors, certain arrangements may give rise to taxable compensation that is required to be reported on the employee's Form W-2 and subject to payroll taxes. For example, an employee would not be considered "away from home" if the duration of the U.S. project (counting multiple trips to the U.S.) exceeds or is expected to exceed one year; as such, the travel expenses would likely be considered taxable to the employee.

When an employee's business expenses are reimbursed under an accountable plan, the reimbursement is not included in the employee's taxable compensation and thus not reportable on the employee's Form W-2. An employer's expense reimbursement will generally be treated as paid under an accountable plan as long as the employee has appropriately accounted for the expenses, has substantiated this accounting to their employer within a reasonable timeframe, and has returned any excess amounts received to the employer.

How can RSM help?

Noncompliance with local requirements may lead to financial and reputational risks and exposures that could put business objectives and projects at risk if international jurisdictions refuse an employee's entry. Failing to meet local requirements may hinder expansion to new markets, lead to monetary penalties and expose the organization to legal challenges from employees and authorities.

The reporting obligations described above need to be carefully managed to ensure that all requirements are met and that tax liabilities are minimized. Organizations may want to establish a compliance checklist in connection with their short-term business travelers.

RSM offers a senior professional-led service that can advise on the data collation, recordkeeping and risk management surrounding your STBTs to the United States.

We utilize bespoke software to manage large populations of visitors and proactively advise on thresholds. We also utilize more practical reporting methods with clients who only need to manage a handful of globally mobile employees. Our international experts will provide clarity regarding the complex tax compliance requirements that your business travelers face globally.

Other jurisdictions

While this document focuses on travelers to the United States, RSM has the international presence and expertise to provide clarity on the complex tax requirements involved with business travelers around the world.

Permanent establishment

Depending on the business activities carried out by the STBT, it is possible for the individual to create entity-level tax filing and payment obligations for the employer. This could occur if the employee's activities constitute a permanent establishment (PE) or taxable presence.

If a foreign company has a U.S. PE, the company will be taxed on the profits that are generated through the activities in the United States. The STBT with a PE may not be eligible for tax relief in the United States under the Dependent Personal Services article of the relevant income tax treaty. This creates a potential exposure to tax audits focused on determining the revenues associated with the activities conducted in said jurisdiction.

While treaties may provide relief where the employee's activities do not constitute a PE, companies must check the facts and circumstances of each situation against local laws, and employers should develop a mitigation or compliance strategy as appropriate.

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