



United States of America

Introduction

An international assignee's liability for United States (U.S.) tax is generally determined by residence status for taxation purposes and the source of income derived. U.S. residents are generally subject to income tax at progressive rates on taxable income for the year, which is calculated by subtracting allowable deductions from the total assessable income.

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Key messages

Extended business travelers are likely to be taxed on employment income relating to their U.S. workdays.

Income tax

Liability for income tax

An assignee's liability for U.S. tax is determined by residence status. An assignee can be a resident, nonresident, or "dual status" for U.S. tax purposes.

Residents are generally taxed on their worldwide income regardless of where or for whom the services are performed or where the income is derived. Compensation includes cash remuneration and the fair market value of property or services received.

Nonresidents are subject to U.S. tax on income from U.S. sources. U.S.-sourced income that is not effectively connected with a U.S. trade or business (generally investment income) is taxed on a gross basis at a flat 30 percent rate (unless a lower treaty rate applies). A nonresident engaged in a trade or business within the U.S. during the taxable year is taxed on income effectively connected with the U.S. trade or business, less allowable deductions, at normal graduated rates. Generally, income effectively connected with a U.S. trade or business includes compensation for personal services performed in the U.S.

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. The dual status foreign national is generally subject to tax on worldwide income for the period of residence and generally only on U.S.-source income for the period of nonresidence.

Extended business travelers may be considered nonresidents of the U.S. 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 the individual qualifies as a resident. A resident is defined as an individual who is either a lawful permanent resident (the green card test) or an individual who meets the substantial presence test.

A lawful permanent resident is an individual who has been officially granted the right to reside permanently in the U.S. These individuals are often referred to as green card holders. For an individual who meets only the green card test, residence begins on the first day of the calendar year in 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.

An assignee who meets the substantial presence test is an individual who has been present in the U.S. for at least 31 days in the current calendar year and 183 days during the current and two preceding years, 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. In

general, a partial day in the U.S. is counted as one full day. There are two exceptions to this test: the exempt individual exception and the closer-connection-to-a-foreign-country exception.

Generally, an exempt individual is 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. (There are conditions to qualify for the exempt individual exception, such as the length of time the visa is held, etc.)

Under the closer-connection exception, during the current year, the assignee must (1) be present in the U.S. for fewer than 183 days, (2) maintain a tax home in a foreign country, and (3) have a closer connection to a single foreign country in which the individual maintains a tax home than to the U.S. Both the "tax home" and "closer connection" determinations are factual issues and are, therefore, subject to some degree of uncertainty, and we recommend that an individual who seeks to qualify for one of these exceptions speak directly to a tax adviser to obtain the proper advice.

Residence under the substantial presence test generally begins the first day during the year in which the assignee is physically present in the U.S. An assignee generally will cease to be a resident following the last day of physical presence in the U.S. provided certain conditions are met.

Note that a period of up to 10 days of presence in the U.S. will not be counted for the purpose of determining an assignee's residency start 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.

Tax trigger points

Other than a fairly limited exception for short-term business visitors (discussed below) or an applicable treaty exemption, there is no other threshold or minimum number of days that exempts the employee from the requirements to file and pay tax in the U.S.

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 3,000 U.S. dollars (USD) or less for such U.S. services, the compensation is treated as foreign-sourced that is not subject to U.S. tax. Many treaties provide more generous exemptions from U.S. tax for income earned by nonresident aliens who are present in the U.S. for short periods (generally up to 183 days during either a taxable year or any 12-month period, depending on the treaty). It should be noted that 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 assignee qualifies for such relief under an applicable double taxation treaty, there will be no U.S. tax liability.

Types of taxable income

For extended business travelers who are not U.S. residents, the types of income that are generally taxed are employment and U.S.-sourced income and gains from taxable U.S. assets (such as real estate). If an assignee meets the conditions of being “temporarily away from home,” certain travel, meals, and lodging expenses may be excluded from income.

If an individual is in the U.S. for a temporary assignment, certain U.S. “away from home” expenses such as travel, meals, and lodging may be deductible (or if reimbursed by the employer, the reimbursements may not be includible in income). The expenses must be (1) ordinary and necessary, (2) incurred in pursuit of a trade or business, and (3) incurred while “away from home.” The individual must be temporarily away from the individual’s foreign principal place of employment (i.e., tax home or, if no principal place of employment, regular place of abode in a real and substantial sense) and the stay in the U.S. must not be indefinite.

No away-from-home living expenses paid or incurred are deductible if the individual’s period away from the individual’s tax home is expected to be more than one year at a single location.

An individual will not be treated as being temporarily away from home during any period of employment if that period exceeds one year. This has been interpreted to mean any period of employment in a single location if such period exceeds one year. 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. Repeated trips to the same location may be characterized as one assignment.

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

We recommend that companies adequately document not only that an employee’s assignment is (or is not) initially expected to last one year or less, but also when the assignment is extended beyond one year.

In addition, when travel expenses are reimbursed through an accountable plan, employers should schedule assignments, where feasible, with projected periods of employment for as close to one year as possible, but not over one year. The optimal assignment for tax purposes is thus 12 months. If properly planned, any reimbursements received by the employee during this away-from-home period will be excludable. Any reimbursements that are received while the assignee is not considered to be away from home will be included in the employee’s gross income as wages with appropriate withholding for social security and income taxes.

Therefore, by properly planning the assignment, both the employer and employee can potentially save employment taxes. In addition, employers with tax equalization policies will likely reduce their tax equalization costs with respect to the assignment.

Tax rates

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

- Married filing jointly
- Married filing separately
- Head of household
- Single

Each filing status is subject to a different graduated tax rate scale from 10 percent to 35 percent for 2011. The maximum tax rate is 35 percent on income over USD379,150 for 2011 for married taxpayers filing jointly, a head of household, and single taxpayers. The maximum rate for 2011 is 35 percent on income over USD189,575 for married-filing-separately taxpayers. These rates are subject to change, and the thresholds are indexed annually for inflation.

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

The filing statuses generally available to nonresidents are married filing separately or single.

Social security

Liability for social security

Social security tax, established by the Federal Insurance Contributions Act (FICA), is imposed on both the employer and employee. FICA is assessed on wages paid for services performed as an employee within the U.S., regardless of the citizenship or residence of either the employee or employer. The employee portion of the tax may not be deducted in computing U.S. income tax.

FICA consists of two parts, the old-age, survivors, and disability insurance tax (OASDI) and Medicare tax (hospital insurance). The OASDI rate is 6.2 percent (4.2 percent in 2011 only) on all wages up to a maximum amount (USD106,800 for 2011). This amount is indexed annually for inflation. The Medicare tax rate is 1.45 percent, imposed on all wages, without a cap. In addition, the employer is required to pay, as a payroll tax, an amount equivalent to the FICA tax imposed on the employee. (The employer contribution remains 6.2 percent in 2011.)

A foreign national employee may be exempt from FICA pursuant to a totalization agreement between the U.S. and the employee's home country. Totalization agreements eliminate dual coverage and contributions for foreign nationals working in the U.S. for limited time periods. The U.S. has entered into totalization agreements with the following 24 countries as of February 28, 2011:

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

Source: KPMG in the U.S., February 2011

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

Compliance obligations

Employee compliance obligations

Tax returns are generally due by the 15th day of the fourth month following the end of the tax year. As virtually all taxpayers are required to follow the calendar year, the tax return due date is generally April 15.

The time for filing can be automatically extended for six months by filing Form 4868. 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. In the case where the nonresident does not have compensation subject to income tax withholding, the tax return is due by June 15.

Nonresidents generally must file income tax returns on time to be permitted to claim deductions. In addition, nonresidents who claim the benefits of treaty provisions or otherwise modify an internal revenue law of the U.S. are generally required to disclose this position on the tax return for the tax year (unless a specific exception applies). A failure to disclose could lead to substantial penalties.

Employer reporting and withholding requirements

Residents are subject to withholding of income tax on wages paid by their employer. Wages include cash and noncash payments for services performed by an employee for the employer, unless an exception applies.

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

A nonresident may also be subject to withholding on U.S.-sourced income that is not effectively connected with a U.S. trade or business (generally, investment income). The withholding rate is 30 percent imposed on gross income, unless lowered by treaty.

Other

Work permit/visa requirements

Generally, a visa must be obtained prior to a foreign national entering the U.S. to work. The type of visa required will depend on the purpose of the individual's entry into the U.S.

Foreign nationals generally must obtain visas at American embassies and consulates to enter the U.S. A waiver of the visa requirement is available to nationals of most developed countries if a trip is brief and for tourism or nonemployment business purposes.

Individuals coming to the U.S. for the purpose of engaging in employment must generally obtain a visa that authorizes such employment. Information on visa and other travel/work document requirements can be obtained from the U.S. embassy or consulate in your jurisdiction or by visiting the U.S. Department of State Web site at www.travel.state.gov.

Temporary or nonimmigrant visas are granted to provide the opportunity of employment in the U.S. Assignees may also be eligible for permanent residence (green card status), which may be based upon the sponsorship by a relative who is a citizen or a green card holder. Additionally, green cards may be issued in connection with permanent employment in the U.S., in which case sponsorship by the employer is not unusual.

Most assignees initially work in the U.S. with nonimmigrant visas.

Certain nonimmigrant visas provide work authorization for an individual's employment in the U.S., as well as for the individual's spouse and dependants. If a particular visa does not provide for work authorization for the assignee's spouse or dependants in the U.S., they would need to obtain their own employment visas to be eligible to work in the U.S.

Because there are many different visa categories, which are applicable to different employment relationships, we recommend obtaining professional assistance from an experienced law firm if the company does not have qualified professionals on staff.

The following is a list of the more typically encountered nonimmigrant visa categories, which allow the holder to work in the U.S. without specific authorization from the Department of Homeland Security (DHS). This listing is abbreviated and, therefore, not all-inclusive.

Class of admission	Description
F-1	Academic student visa – for on-campus employment and designated school official (DSO) authorized curricular practical training
H-1B	Visa for foreign professionals sponsored by a U.S. employer to work in specialty occupation
J-1	Visa for individuals participating in work and study based on approved exchange visitor programs
L-1	Temporary work visa for intracompany transferee
L-2	Temporary work visa for the spouse of an intracompany transferee

Source: KPMG in the U.S., February 2011

Double taxation treaties

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

Permanent establishment implications

There is the potential that a permanent establishment could be created as a result of extended business travel, but this would depend on a number of factors (e.g., the type of services performed, the level of authority the employee has, duration, etc.) and is beyond the scope of this document.

Indirect taxes

The U.S. 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.

Transfer pricing

The U.S. has a transfer pricing regime. Transfer pricing implications could arise to the extent that the employee is being paid by an entity in one jurisdiction but performing services for the benefit of the entity in another jurisdiction, in other words, a cross-border benefit is being provided. How such a proper reimbursement is calculated is dependent on the nature and complexity of the services performed.

The U.S. rules are provided for pursuant to Internal Revenue Code section 482 and the related regulations. Caution: If a foreign person pays the salary of an employee who is employed in the U.S., but a U.S. corporation or permanent establishment reimburses the payor with a payment that can be identified as a reimbursement, it is likely to cause certain requirements of the income from the employment article in the double taxation treaty to be considered to have not been fulfilled, thereby disallowing the application of the treaty benefit.

Local data privacy requirements

The data privacy rules in the U.S. arise from a collection of federal, state, and industry case law, statutes, and practices as a result. There is no independent oversight agency in the U.S.

Rules and oversight come from the following, for example (by no means a comprehensive listing):

- The Office of Management and Budget plays a limited role in setting policy for federal agencies under the Privacy Act of 1974.
- The American Institute of Certified Public Accountants has developed a Generally Accepted Privacy Principles framework that companies can follow.
- The Federal Trade Commission has oversight over some data privacy areas.
- The USA PATRIOT Act addresses some privacy issues. (As of February 28, 2011, the USA PATRIOT Act is scheduled to expire on May 29, 2011.)

Exchange control

Generally, no restrictions are imposed on bringing money into or out of the U.S. Transfers of more than USD10,000 in a single transaction, however, must be reported to the Commissioner of Customs on Form 4790. This report is not required if the transfer occurs through normal banking channels. Certain individuals also 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 USD10,000 at any time during the year. This report is filed on Form TD F 90-22.1 with the Department of the Treasury by June 30 of the following year.

If, however, a "listed" country or entity is involved, then there can be extensive embargoes, sanctions, record keeping, and other restrictions on the flow of funds. The U.S. Treasury and the Office of Foreign Assets Control maintain the list of countries and entities.

Non deductible costs for assignees

Some assignees may find the U.S. definition of gross income broad and the number of allowable deductions limiting when compared to their home countries. U.S. taxation of retirement-focused funds and deductibility of moving expenses are two areas where assignees 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 be taxed on the vested accrued benefits. In addition, the assignee may not be able to deduct current contributions, 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.

The definition of deductible moving expenses for U.S. purposes also is more limited than what is allowed in some other countries. Extended business travelers whose tax

home does not shift to the U.S. will generally not be able to deduct moving expenses, as these are deductible only if the taxpayer will be employed at the new principal place of work on a permanent or indefinite basis. The general rule for employees is that moving expenses will be deductible if the taxpayer will be employed at the new place for more than 39 weeks.

For assignees who can deduct moving expenses, deductible moving expenses incurred with moving to a new location for employment-related reasons are limited to the reasonable expenses of:

- Moving household goods and personal effects to the new residence
- Travel and lodging costs during the move
- In the case of foreign moves, moving household goods to and from storage and storing such goods.

The definition of moving expenses does not include the following (this list is not all-inclusive):

- Meal expenses
- The costs of selling the old residence or purchasing a new residence
- Expenses of obtaining or breaking a lease
- Loss on sale of a house
- Automobile registration or driver's license fees
- Security deposits.

There are many other items that the U.S. considers as taxable income or disallows as deductions that may significantly differ from the assignee's home country rules. It is recommended that all assignees to the U.S. for any period of time seek professional assistance with their U.S. federal, state, and local tax obligations.

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act upon such information without appropriate professional advice after a thorough examination of the particular situation.

The material contained within draws on the experience of KPMG tax personnel and their knowledge of local tax law in each of the countries covered. While every effort has been made to provide information current at the date of publication, tax laws around the world change constantly. Accordingly, the material should be viewed only as a general guide and not be relied on without consulting your local KPMG tax adviser for the specific application of a country's tax rules to your own situation.

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