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Tackling Tax Compliance Issues for Short-Term Business Travelers

February 27, 2019

Not-for-Profit Entities Webinar

A silhouette of two climbers on a mountain peak against a sunset sky. One climber is reaching up to help the other. The background shows a range of mountains and a warm sunset glow.

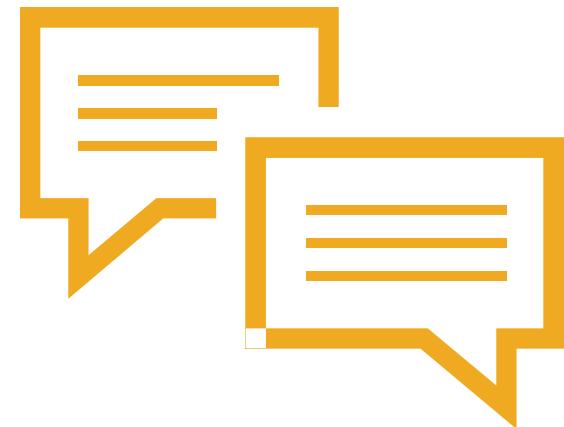
Gary T. Johnson
Laurie J.S. Marson

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Today's Speakers



Niki Benecik, CPA

Partner – Not-for-Profit Sector

- 20+ Years serving Not-for-Profit Organizations
- Frequent tax education speaker
- Univ. of Illinois – Masters in Tax



Gary T. Johnson, CPA

National Director - Global Mobility Services

- Leads firm's GMS practice
- Former GMS Partner with KPMG and EY
- 30+ Years of GMS experience
- International assignments: Tokyo and Sydney
- UNC Chapel Hill – Kenan Flagler Business School



Laurie J.S. Marson, CPA

Sr. Manager - International Tax, Global Mobility Services

- 20+ Years of GMS experience
- International assignments: Paris, France, Buenos Aires
- University of Hawaii (Manoa) – BBA - Accounting

Agenda

- Getting Started – Taxation and Work Permission
- Who is a Short Term Business Traveler?
- Risks Associated with Short Term Business Travelers:
 - Domestic U.S. and Outbound from the U.S.
 - Inbound to the U.S.
- Questions and Answers



Getting Started



Polling Question #1

How would you assess your organization's current process for monitoring short term business travelers and any related compliance matters?



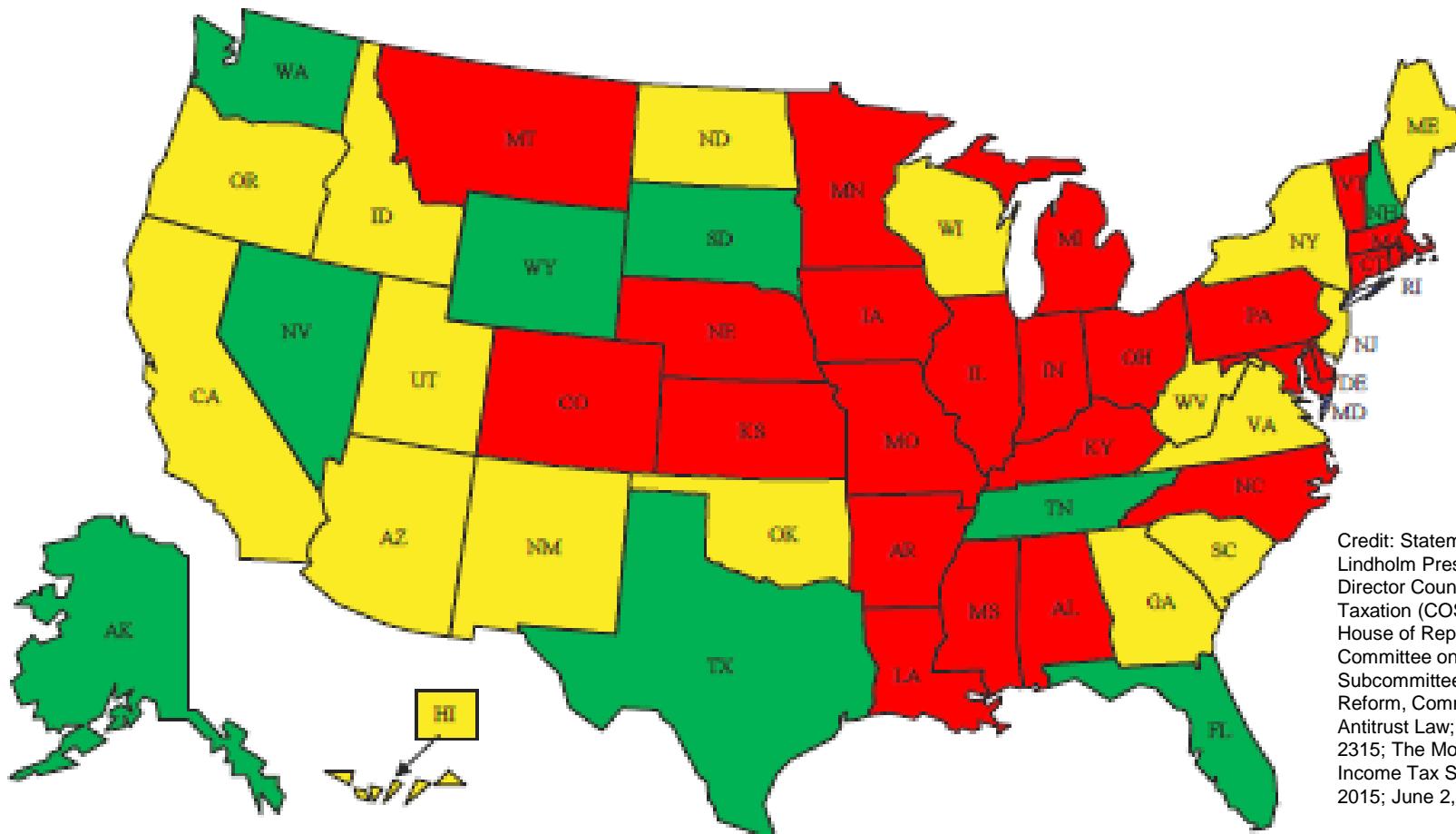
- a. Well defined / working as intended
- b. Limited parameters in place
- c. Reactionary – we address when problems arise
- d. Unaware of this risk

Getting Started

Employment taxation – basic principles

- Work performance location generally determines taxation
- U.S. persons (citizens and/or residents) are taxable on all income from any source or location
- Source of payment does not generally impact taxation
- Location of receipt of payment does not generally impact taxation
- Being in a country less than 183 days does not automatically mean an employee is not taxable
- Income tax withholding and Social tax withholding/reporting obligations may be required of the employer even if ultimately no tax is due from the individual
- Most countries require individuals to have “permission” to work

Nonresident Personal Income Tax Withholding



Credit: Statement of Douglas L. Lindholm President & Executive Director Council On State Taxation (COST) before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law; Hearing on H.R. 2315; The Mobile Workforce State Income Tax Simplification Act of 2015; June 2, 2015

Key

- Nonresident employees subject to tax withholding on first day of travel
- Nonresident employees subject to tax withholding after reaching threshold
- No general personal income tax (or, in the case of Washington, D.C., no tax on nonresidents)

Nonresident Personal Income Tax Withholding (Continued)

- Withholding Thresholds— More than half of the states that have a personal income tax require employers to withhold tax from a nonresident employee's wages beginning with the first day the nonresident employee travels to the state for business purposes. Some personal income tax states (identified on the map with a yellow background) provide for a threshold before requiring tax withholding for nonresident employees.

State Reciprocal Agreements

Reciprocal Agreements

- In addition to the thresholds shown above, many states have reciprocal agreements with neighboring states that provide that taxes are paid in (and withheld for) the resident state only
- The converse also applies. In most states with reciprocal agreements, a “certificate of nonresidence” must be filed either with the employer or the nonresident state.
- States generally only have reciprocal agreements with neighboring states, however, D.C. exempts all income taxed by another state
- Many states have no reciprocal agreements

Current Legislative Action

Mobile Workforce State Tax Simplification Act of 2017

- Previous versions introduced in 2007, 2009 and 2015 – all died in the Senate
- HR 1393 passed the House without amendment 6/20/2017
- S.540 introduced 3/7/2017 in Senate – in committee
- Federal floor > 30 days in any year before reporting and withholding
(Retroactive to day 1 once day 31 is reached)
- Employer can rely on the Employee's determination of time spent outside Resident state *(Exceptions exist in case of Fraud, Collusion or existence of a Time & Attendance System)*

Dissenting Views

- 30 days is > 10% of the work year: too long
- Greatest revenue loss is NY at ~ \$100 Mil+ > revenue impact on all other states combined

U.S. Work Permission Rules

U.S. Employment – basic principles

- U.S. citizens and lawful permanent residents (“Greencard Holders”) are eligible for employment and should have received a social security number at birth or upon receipt of resident status
- All others (“foreign nationals”) must have a permit to work, officially known as an Employment Authorization Document (EAD)
 - Employers are required to confirm all employees are legally able to work in the U.S.
 - Employees are required to provide documentation that they are authorized to work in the U.S.
- Foreign National Worker Categories
 - Those holding “work” visas
 - Temporary (non-immigrant) Workers
 - Student and Exchange Visitors

U.S. Work Permission Rules

U.S. Employment – basic principles (continued)

- Visa classifications allowing U.S. employment
 - E-1 / E-2 – Treaty Trader / Treaty Investor
 - F-1 – Foreign academic student (when certain conditions met)
 - H-1B, H-1C, H-2A, H-2B, H-3 – Temporary worker
 - I – Foreign information media representative
 - J-1 – Exchange visitor (when certain conditions met)
 - L-1 – Intra-company transferee
 - M-1 – Foreign vocational student
 - O-1, O-2 – Temporary worker in the sciences
 - P-1, P-2, P-3 – Temporary worker in the arts, athletics in an exchange or cultural program
 - Q-1, Q-2 Cultural exchange visitor
 - R-1 – Temporary religious worker with a nonprofit organization
 - TC, TN – Professional business worker under NAFTA

What is a *Short Term Business Traveler*?



What is a Short Term Business Traveler?

A *short term business traveler (STBT)* is an individual who crosses a border (country or state) for a short period of time for employment-related purposes.

- Generally not covered by entity's short or long term assignment policy
- Generally no HR involvement and often no official legal department involvement (i.e., work visas)
- For interim management or sales roles in new locations
- Employee remains tax resident in home location
- Employee remains on home location payroll
- Generally employee receives travel benefits and/or reimbursements

What is a Short Term Business Traveler?

A permanent or even temporary “flex-place” employee working in an offsite location that is not considered “normal”.

- Personal reasons (with or without approval)
- Employee request (may be longer than short term)
- Spouse relocation (may be longer than short term)
- Supervisor may approve non-standard work location without understanding employer tax risks or consulting with HR/company policies
- HR may approve but not be aware of payroll reporting requirements

“We have a flexible work policy – our employees can do their work anywhere!”

Polling Question #2

Do any employees work in US States other than their Residence State for various employment reasons: (check all that apply):

- a. Visit with suppliers/customers
- b. Attend/lead training sessions
- c. Attend client/company meetings
- d. Specific offsite project or other work assignment
- e. Business development
- f. Approved flexible work location
- g. Unapproved (unilateral) flexible work arrangement
- h. Working while at vacation location
- i. Other reason



Risks Associated with Short Term Business Travelers: Domestic U.S. and Outbound from the U.S.

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Getting Started - Risks Associated with Short Term Business Travelers

“What could possibly happen?”

- Damage to company's reputation
- Creation of unintended permanent establishment
- Failure to meet regulatory compliance requirements (employer reporting/withholding)
- Budget overruns (added fees, penalties and interest)
- Immigration / labor law non-compliance Issues
- Criminal prosecution (responsible parties)
- Unhappy employees (delays, aggressive regulators, additional tax costs or related inconveniences)

Risks Associated with Short Term Business Travelers – Domestic U.S. and Outbound from the U.S.

“We’ve never had a problem before – why should we worry now?”

- Better information accumulation/analysis used by jurisdictions
- Number of business travelers/short term assignments is increasing
- Misconception about availability/accessing of treaty benefits
- Governments actively targeting multinational companies as deep pockets to help them close local budget shortfalls
- State authorities actively targeting large U.S. companies not registered in their state
- Key data points per individual being monitored
- Nature of activities in jurisdiction being monitored
- Length or number of visits in jurisdiction being monitored
- Outbound foreign nationals may have different payroll reporting requirements in US

Risks Associated with Short Term Business Travelers – Domestic U.S. and Outbound from the U.S.

Primary Trigger – time spent in jurisdiction on business or profit seeking activities there

- U.S. employees traveling regularly to Mexico/Canada
- Your employee working remotely due to spouse's relocation or temporary assignment
- Your employee working from home in another state

State employer reporting thresholds for employer reporting of business travelers varies

- New York – 14 day *de minimis* for employer reporting (but employee reporting may be required with NR return)
- Utah – employer does business in the state for more than 60 days in a calendar year
- Georgia - earns more than \$5,000 or 5% of total income is attributable to Georgia in a calendar year

Polling Question #3

Which functions/departments are involved in decisions surrounding short term business travel? (check all that apply)

- a. Human Resources
- b. Operational Managers
- c. Payroll/Corporate Tax/Finance
- d. Legal/Risk Management
- e. C-Suite
- f. Other departments
- g. We have no business travelers



Risks Associated with Short Term Business Travelers – Domestic U.S. and Outbound from the U.S.

Related Matters - Social Taxes

- No *de minimis* thresholds in U.S. and most other countries
- Employer withholding, remitting and reporting due for one day in jurisdiction
- Social taxes may be suspended for a limited period of time under a Social Security Totalization Treaty - Certificate of coverage needed (should be obtained prior to start of trip)

Related Matters - International Tax Treaties

- 183 day rule for start of tax compliance obligation is a myth
 - May require specific reporting/documentation in order to eliminate taxes – if nothing done, then treaty may not be available
 - Canada – without a business visitor exemption – employer withholding required and individual tax filing required to recover withholding
- Available to eliminate **double** taxation of income

Risks Associated with Short Term Business Travelers – Domestic U.S. and Outbound from the U.S.

Employer Issues to Consider/Address:

- Jurisdiction registration and reporting
 - Other taxes – VAT, Sales, Franchise, Privilege, etc.
- Withholding and remittance requirements/reporting
- Internal tax policies with respect to traveling employees
- Corporate tax (Nexus and/or PE risks)
- Compliance required to obtain benefit of any reciprocal agreement or international treaty
- Costs of additional efforts of departments to monitor, respond, manage, allocate, etc. for multiple site operations
- Labor law and potential immigration/work visa requirements

Risks Associated with Short Term Business Travelers – Domestic U.S. and Outbound from the U.S.

BEPS (Action Plan on Base Erosion and Profit Shifting) includes 15 actions and 5 are related to the movement of company employees

- Action 7: Preventing the artificial avoidance of permanent establishment status
- Actions 8-10: Aligning transfer pricing outcomes
- Action 13: Transfer pricing documentation and country-by-country reporting

Risks Associated with Short Term Business Travelers: Inbound to the U.S.

Risks Associated with Short Term Business Travelers – Inbound to the U.S.

Primary trigger: time spent (amount varies) in jurisdiction on business/profit seeking activities there

- Non-U.S. employees traveling regularly to the U.S. (one week a month) from affiliate locations globally
 - May work at multiple locations in different states
- Federal individual income tax *de minimis* - \$3,000 or 90 days in U.S.
- State individual income tax *de minimis* amounts vary and may be very different than federal amount and/or time period



Polling Question #4

**What types of visas do your International business visitors (employed by your affiliated entities) use when working in the US?
Select all that apply.**

- a. Visitor waiver based on Passport
- b. B-1/B-2 Business Visitor visa
- c. E-1 / E-2 visa
- d. F-1 foreign student
- e. H1-B visa
- f. J-1 visa (trainee)
- g. L-1/L-2 visa
- h. O or P visa (Arts or Sciences exchange)
- i. Q or R visa (Cultural or Religious)
- j. TC or TN visa - NAFTA
- k. No workers from outside of the U.S. visiting our US facilities



Questions and Answers



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Thank you

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Short Term Business Travelers (STBT) Summary

Identify/Define Client Profile

Domestic US Activities

- Filing a multi-state corporate return? Filing payroll returns in those same locations? Noted increases in state revenues correspond to increased employment costs in same state?
- Any sales activities or business related travel outside HQ state? Non-Nexus States?

Foreign Owned or Affiliated Company Activities

- Any foreign visitors arriving in the US on business? Activities? Visa? Frequency?
- Any individuals receiving lodging or travel expenses that are not on the company payroll?
- Any US employees traveling overseas to related/affiliated foreign entities on business? Activities? Visa? Frequency?
- Any payments made from US to a foreign entity? Individual?

Going Global/Entering New Markets

- Any US employees traveling to new foreign locations (market research, sourcing searches, sales, business development, joint venture/scoping partner relationship, etc.) on business? Activities? Visa? Frequency?

Business Risks

Reputation Risk (Government contractor, regulated contractor, media headlines, etc.)

Income Tax Compliance (Tax authorities increasingly more assertive - both states and other countries - and more data collected and accessible to tax authorities)

- Corporate level (including permanent establishment)
- Employee level
- Employment Tax Compliance
- Employer reporting requirements
- Employer Withholding and remitting
- Immigration Compliance
- Legal work status; delayed/held at the Border; prosecution
- Regulatory Compliance
- Employment law
- BEPS (Base Erosion and Profit Sharing)

Short Term Business Travelers (STBT) Summary (Continued)

Quick Health Check (Phone consultation with Crowe GMS team) – COMPLIMENTARY

- Assess any hot spots? Areas of potential non-compliance at individual or corporate level due to activities, visa, frequency of visits by employees or leadership.
- Rough quantification of tax compliance risk exposure (see Business Risk details above)
- Leverage any public data available – Proxy statement, SEC filings, Company website and social media information along and related assumptions

Client Stakeholders

1. Legal / CRO / other C Suite Members
2. VP Tax / Tax Director
3. Payroll Leader as well as Controller/CFO
4. Travel Department/Provider
5. CIO/Technology Team
6. HR/Benefits

Quick White Board Session (On-Site with Crowe GMS Team)

Refine Potential Exposure / Prioritization of Risk Mitigation

- Identify Potential Hot Spots - Activities? Visa? Frequency? (States, and/or Countries)
- Leverage readily available details and supplement with reasonable assumptions
- Consider sources for obtaining best relevant data going forward (company travel provider, time recording system, computer log in data, etc).
- Identify optimal initial population: (C Suite, Highly compensated employees, easiest group to monitor, etc)
- Establish baseline short term business travel policy around optimal initial population
- Expand population once short term business traveler process is implemented while refining policy to fit corporate culture.

Questions to think about.....

Ownership

- Who owns the STBT initiative at your company?
- What or who ensures/drives compliance?
- Do STBT objectives align with the business strategy?
- Which functional units participate in the STBT initiative?

Policies and process

- Do you have policies which cover STBTs?
- Do you have processes which cover STBTs?
- To what extent is compliance with the above tracked?
- When were the above last updated?
- How do you validate the residency or nonresidency status of your employees?

Moving forward – best practice suggestions

- Engage a cross-functional team to implement (business, HR, tax, payroll, accounting/finance, legal should all be represented) with defined responsibilities
- Create and obtain leadership endorsement for a business traveler policy
- Create a scalable process targeting the highest value/biggest exposure business travelers initially
- Create an inclusive travel approach such that all risks/needs are addressed – not just short term business line objectives
- Communicate value to individuals/business group/company
- Obtain external/identify internal qualified and knowledgeable resources

Moving forward – possible information sources to evaluate exposures/begin implementation

- Historical travel information
- Booked travel
- Time reporting system
- Expense reporting system
- Company business model
- Company projects
- Company locations
- Corporate jet usage
- Mobile applications
- Site Security protocols
- Network logins
- Immigration information (visa processing)
- HR data

Useful Information

General definitions of assignment types – will vary by organization

- Long Term assignment – usually 18 months to 5 years
- Short Term assignment –usually 3 months to 18 months
- Business trip
 - shorter than a short term assignment
 - multiple trips to same location may actually exceed jurisdictional tax thresholds (income and/or social taxes)
 - may also create risks for individual/company

Determination of right of taxation

- Where work is performed
- Regardless of where paid or where benefit received

Useful information (continued)

Potential Permanent Establishment (PE) Risks:

- Business activities in a country which results in “revenue” being generated is likely to be deemed (by local authorities) as having created a “PE”
- Local country authorities will assess corporate tax on a “deemed revenue” arising in country
- In most countries to “recognize” a PE, it needs to be formally registered under some corporate identity, typically a branch, representative office, or a subsidiary entity
- A PE will not be deemed to be created where the activity performed is truly “representative” in nature
 - For example, when undertaking a marketing activity where no direct or indirect revenue can be attributed
 - Treaty language may otherwise define the existence of a PE