

10<sup>TH</sup>  
ANNIVERSARY  
IN 2021

# CROSS-BORDER REMOTE WORK FAQs

## USA

**1. Assume that a foreign national employee of a foreign company wishes to work remotely for a period of time in your country performing services exclusively for the foreign company and not interacting with the local market in your country.**

IS WORK AUTHORIZATION REQUIRED? IF SO, PLEASE PROVIDE A BRIEF DESCRIPTION OF THE TYPE OF VISA, PROCEDURE, PROCESSING TIME, ETC.

*There is not a remote work/digital nomad type visa for the U.S. Work authorization (probably in the form of a nonimmigrant visa) would be required and that requires the sponsorship of a U.S. employer. If, however, the employee validly enters the US as a tourist or business visitor and the primary purpose of the visit is consistent with that entry, the individual would be able to do some work such as checking emails without additional authorization.*

*In addition, several Presidential proclamations have established restrictions on the entry of certain travelers into the United States in an effort to help slow the spread of coronavirus disease 2019 (COVID-19).*

*Updates on U.S. travel restrictions are available [here](#).*

IS THERE RISK OF “PERMANENT ESTABLISHMENT” CONSEQUENCES FOR THE FOREIGN COMPANY BY VIRTUE OF THE REMOTE WORKER’S ACTIVITIES? IF SO, WHAT ARE THE MAIN FACTORS DETERMINING THE EXPOSURE.

*This depends on the employee’s activities. In general, U.S. income tax treaties define a U.S. permanent establishment to include a fixed place of business in the United States through which the foreign enterprise carries on its business. However, a foreign enterprise will not be deemed to have a U.S. permanent establishment if its activities in the United States are limited to certain activities -- generally those of a preparatory or auxiliary nature. A foreign enterprise will also be considered to have a U.S. permanent establishment in respect of activities undertaken on its behalf by a dependent agent who has and habitually exercises in the United States an authority to conclude contracts that are binding on the foreign enterprise and related to its essential business operations.*

*A foreign enterprise will not be deemed to have a permanent establishment in the United States merely because it carries on business in the United States through a broker, general commission agent, or any other agent of an independent status, provided that such person is acting in the ordinary course of his business as an independent agent.*

AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES WOULD THE REMOTE WORKER BECOME SUBJECT TO LOCAL SOCIAL SECURITY AND OTHER PAYROLL REQUIREMENTS? CAN SUCH REQUIREMENTS BE FULFILLED BY A FOREIGN COMPANY, AND IF SO BY WHAT MECHANISMS?

*Resident and nonresident aliens employed within the United States by a foreign employer are generally subject to Social Security and Medicare tax withholding by the foreign employer. Revenue Ruling 92-106, 1992-2 C.B. 258 provides detailed information on this subject. Certain exceptions to mandatory Social Security and Medicare tax coverage are listed in IRS Publication 15, Circular E, **Employer's Tax Guide**. However, individuals employed in the United States by a foreign employer may be exempt from U.S. Social Security and Medicare taxes under the terms of a **Totalization Agreement**.*

AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES DOES THE REMOTE WORKER BECOME SUBJECT TO LOCAL EMPLOYMENT LAW REQUIREMENTS SUCH AS IS WAGE-HOUR, LOCAL HOLIDAYS, ANNUAL LEAVE, MATERNITY LEAVE, DISABILITY LEAVE, PROTECTION AGAINST UNFAIR DISMISSAL, ETC.

*While generally foreign entities with foreign nationals working in the US are subject to U.S. employment law, the threshold for coverage under US federal anti-discrimination laws is at least 15 employees. This includes both employees (foreign and U.S. citizens) present in the U.S. as well as U.S. citizens working for the foreign entity abroad. Likewise, the threshold for coverage under the American Disabilities Act is at least 25 employees, and for the Family and Medical Leave Act the threshold is at least 50 employees. State*

*employment laws frequently have lower thresholds for discrimination claims and may apply across the board to areas such as wage/hour regulation.*

ARE THERE SPECIAL REQUIREMENTS GOVERNING REMOTE WORK IN YOUR COUNTRY WHICH WOULD COVER THE REMOTE FOREIGN WORKER?

*Generally, the U.S. does not have specific requirements governing remote work. In California, employers are required to reimburse employees for all necessary business expenses. Before the pandemic, business expenses were usually limited to costs such as business travel or personal car mileage because workforces were operating within offices. Now, employers in California must consider an expanded view of business expenses (such as, for example, reimbursement for cell phone or home internet use) as employees remain at home.*

WHAT IS THE EMPLOYEE'S EXPOSURE TO LOCAL INCOME TAX, AND UNDER WHAT CIRCUMSTANCES IS THE FOREIGN EMPLOYER REQUIRED TO ARRANGE FOR WITHHOLDING OF INCOME TAX?

*Wages paid to a nonresident alien employee with respect to services performed in the US are generally subject to federal, state and local income taxes, and to withholding. There is an exception for federal income tax purposes for services performed within the US for a foreign corporation by a nonresident alien individual temporarily present in the US for 90 days or less during the taxable year and whose compensation is \$3,000 or less in the aggregate. Treaty exceptions may also apply to change tax treatment.*

WOULD THE REMOTE WORKER BE ENTITLED TO BRING A CLAIM FOR WORKPLACE INJURY IN YOUR COUNTRY?

*No, while in most states worker's compensation is available to non-U.S. citizens, the worker must be employed by a U.S. company to be entitled to coverage.*

## WOULD THE REMOTE WORKER BE COVERED UNDER THE LOCAL NATIONAL HEALTHCARE SYSTEM OR INSURANCE?

*While a foreign remote worker would not be covered by a U.S. government health plan, a foreign remote worker with proper work authorization qualifies as a “lawfully present immigrant” (which includes an individual who has obtained a “valid non-immigrant visa”) and therefore eligible for coverage through the Health Insurance Marketplace. A lawfully present immigrant can purchase private health insurance on the Marketplace.*

## IS A FOREIGN EMPLOYER SUBJECT TO DATA PRIVACY AND SECURITY REQUIREMENTS REGARDING PROTECTION OF EMPLOYEE PERSONAL INFORMATION FOR A FOREIGN EMPLOYEE WORKING REMOTELY IN YOUR COUNTRY?

*Generally, state and federal U.S. data privacy and security laws only provide protection for personal information of residents of the particular U.S. jurisdiction. If a worker were eligible to domicile in the U.S. they would be able to receive the same rights and privileges for applying for residency as U.S. citizens or permanent residents, however generally the type of visa which a remote worker would qualify for, would not make the individual eligible to domicile.*

*That said, the Health Insurance Portability and Accountability Act (HIPAA) which is a federal law that creates national standards to protect sensitive patient health information from being disclosed without the patient’s consent or knowledge, applies to any patient treated in a healthcare facility in the U.S., regardless of nationality or residence status.*

## HAS THERE BEEN ANY LITIGATION OR SPECIFIC LAW OR REGULATION REGARDING THE FOREIGN REMOTE WORKER IN YOUR COUNTRY?

*During the COVID-19 pandemic the Internal Revenue Service (IRS) and U.S. Treasury Department issued guidance and relief relating to U.S. federal income tax liability and related reporting requirements for foreigners unable to return to their country of residence,*

*and foreign companies that may inadvertently experience “permanent establishment” consequences due to the inability of their employees to return home. Eligible individuals present in the U.S. for an extended time period due to COVID-19 were entitled to exclude up to 60 days of presence in the U.S. for federal income tax purposes, deemed a “COVID-19 Emergency Period”, that started anytime between February 1 and April 1 2020. “Eligible individual” is defined as an individual 1) who was not a U.S. resident at the close of the 2019 tax year, 2) who is not a lawful permanent resident at any point in 2020, 3) who is present in the U.S. (without regard to this revenue procedure) on each of the days of the individual’s COVID-19 Emergency Period, and 4) who does not become a U.S. resident in 2020 due to days of presence in the U.S. outside of the individual’s COVID-19 Emergency Period. (See Rev. Procedure 2020-20.)*

### **2. Would any of the above answers change if the remote worker (a) is a citizen of your country, or (b) engages in activity interacting with the local market.**

*If a remote worker is a U.S. citizen, then no work authorization would be needed for the remote work. If the employee (whether US citizen or foreign national) engages in activity in the local market, then special attention needs to be given to avoiding “permanent establishment” exposure as discussed above.*



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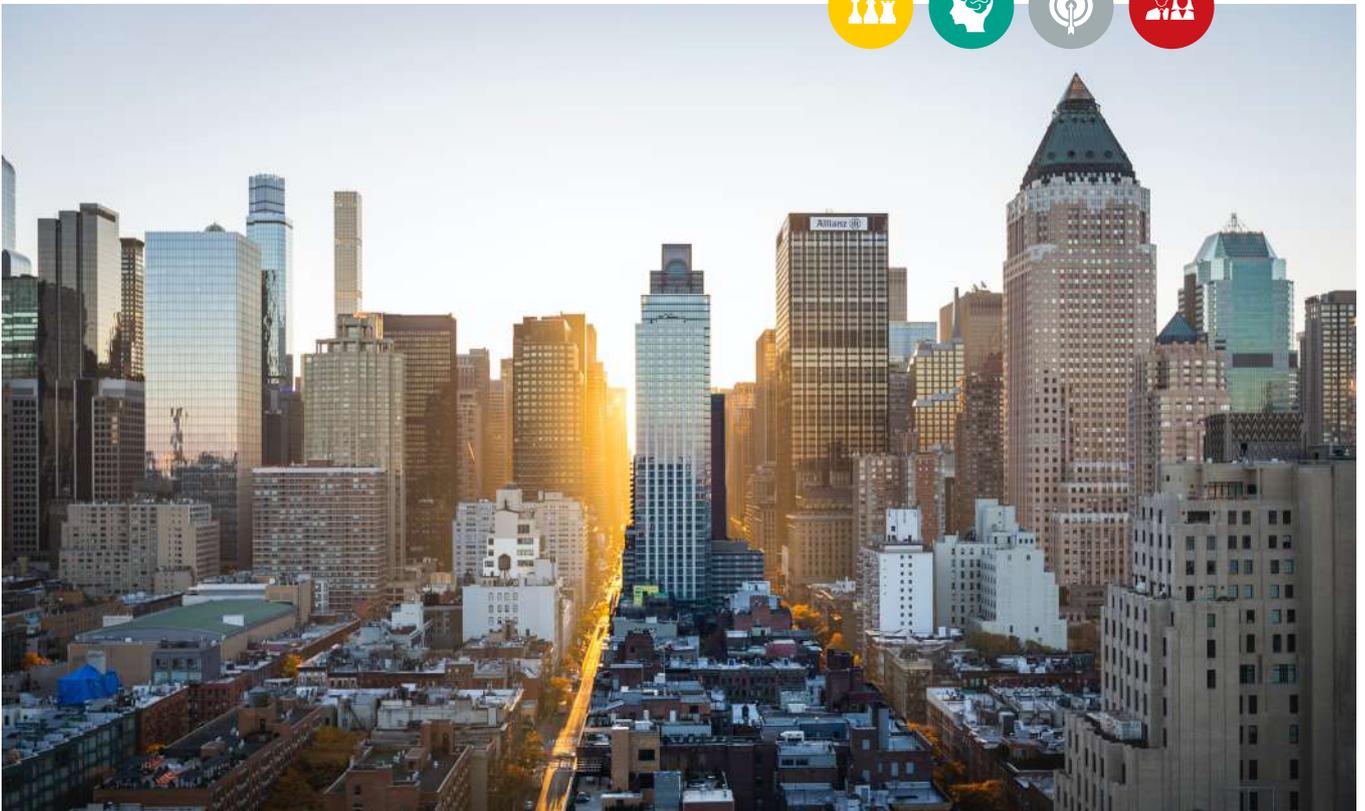
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