

## IRS issues relief to foreigners stranded in the United States due to coronavirus

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COVID-19 has caused global consternation for many reasons, including the fact that the rapid global shutdown of travel and imposition of lockdowns and other restrictions has stranded travelers often where they had no intention of staying indefinitely. While stories of those stuck in Hawaii, Florida and other sought-after destinations might at first blush appear amusing, for the foreigner so stuck in the United States, the risk arises of potential unwanted US tax residency being created as a result of the unplanned extension of their US stay. US tax resident status brings with it taxation and reporting of worldwide income, as well as the risk of a potential US tax bill for (otherwise non-US) employer earnings or for foreign, non-US companies controlled by these potential “accidental” US tax residents.

Initially, foreigners stuck in the United States had no US guidance with respect to how the Internal Revenue Service would treat specifically the time they were stuck in the United States due to COVID-19. Thankfully, on April 21, 2020, the Treasury Department and the Internal Revenue Service issued guidance that provides relief to individuals and businesses impacted by travel disruptions arising from the COVID-19 pandemic. For many stuck foreigners, this guidance means that they have an extra 60 days they can be in the United States in 2020 without becoming globally taxed resident aliens.

[Revenue Procedure 2020-20](#) provides relief to nonresident individuals who, but for COVID-19 Emergency Travel Disruptions (as defined below), would not have been in the United States long enough during 2020 to be deemed resident aliens under the “substantial presence test” or to be ineligible for treaty benefits with respect to determining their tax residency status.

### Why does US tax residence matter?

If someone is deemed a US tax resident, this status can be important for a number of reasons:

- US tax residence exposes an individual’s worldwide income to US federal taxation and reporting;
- US estate tax implications can also potentially arise, subjecting the individual to a 40% tax on the value of their worldwide estate at death;
- The number of days a foreign taxpayer is able to spend in the United States during the next year might be impacted, even if they avoid being a US tax resident in 2020.
- The risk may be increased for income taxation by one of the individual states (e.g., California with its maximum income tax rate of 13.3%).

### Key Tests for Residency

Thus, under existing guidance prior to Revenue Procedure 2020-20, individuals who can no longer travel, due to the illness or quarantine of themselves or loved ones, or due to legal or practical travel restrictions, could unwittingly trip over the residence rules and find themselves fully

enmeshed in the US tax system. The principle tests for US tax residency are contained in Internal Revenue Code (“IRC”) section 7701(b). This section was enacted in 1984 and obviously did not contemplate how an alien’s classification as a “resident” or “nonresident” might be impacted by the coronavirus or another global pandemic. Thus, the code provision and related regulations contain little guidance as to how they should apply in the face of the current global COVID-19 pandemic.

Section 7701(b) provides that an individual will be treated as a resident alien for federal income tax purposes (there is a separate test of US tax residency for federal estate, gift and other transfer tax purposes) in a given calendar year only if such individual meets one of two tests. The first income tax residency test, often referred to informally as the “green card” test, causes an individual who entered the United States on a US permanent resident visa to be a US resident for federal income tax purposes. These individuals are US tax residents under US internal tax law, but that status can be avoided if there is an overriding determination of foreign tax residency pursuant to a tax treaty that the alien’s home country has with the United States.

The second of the two tests, referred to as the “substantial presence test,” is more relevant to the foreigner currently stuck in the United States with their departure delayed due to COVID-19. The substantial presence test is applicable only to alien individuals who are not lawful permanent residents. The foreigner’s status under this test is what generally must carefully be monitored to avoid undesired US income tax resident status.

Under the substantial presence test, an alien individual is a US tax resident for a calendar year if the individual is present in the United States on at least 31 days during the calendar year and the sum of (1) the number of days of US presence in the calendar year, (2) one-third of the number of days of US presence in the preceding calendar year, and (3) one-sixth of the number of days of US presence in the second preceding calendar year (the “formula”) totals 183 days or more.

Under the “closer connection exception” to a determination under the three-year formula, an alien, who has not been present in the United States for at least 183 days in the current calendar year, may still not be treated as meeting the substantial presence test. Under the closer connection exception, a foreigner, who is otherwise facing tax residency under the regular three-year formula, can still avoid tax residency if it is established that the individual has a so-called “tax home” in a foreign country and has a closer connection to such country than to the United States. This exception is not available, however, if the individual has taken steps to apply for status as a lawful permanent resident (i.e., to obtain a “green card”). Still, even if the foreigner has met the three-year formula for tax residency under the substantial presence test and cannot take advantage of the closer connection exception (e.g., because they are present in the United States a total of 183 days or more in the current calendar year), if the foreigner’s home country has a tax treaty with the United States and the foreigner remains a tax resident of their home country under its residency rules, they may be able to avoid US tax residency pursuant to the treaty’s residence article.

The US tax code does allow for some exclusions to strictly counting every day of US presence for residency purposes under the substantial presence test. Thus, individuals are not treated as being in the United States on any day that (a) the individual is an “exempt individual” (e.g., qualifying full-time students, certain teachers, certain diplomats and other foreign-government related individuals, and certain professional athletes while competing in defined charity-sponsored sporting events), (b) the individual is in limited transit between two foreign countries, (c) the individual is a regular commuter residing in Canada or Mexico who commutes to and from employment in the United States, or (d) the individual meets the medical condition exception described below.

Under the medical condition exception, days, in which an individual cannot leave the United States due to a medical condition which arose while they were in the United States, are excluded days not counted towards days of US presence under the substantial presence test. Importantly, as a general rule, an alien relying on the medical condition exception to exclude days of US presence must leave the United States as soon as practical once their medical condition permits their departure and must file a specific information report (IRS Form 8843) regarding their reliance on the medical condition exception. Specifically addressing the impact of the COVID-19 on foreigners stuck in the United States due to the pandemic, Revenue Procedure 2020-20 expands on this medical condition exception to provide relief for foreigners stuck in the United States as a result of the COVID-19 Emergency. The COVID-19 Emergency is defined for these purposes as the global outbreak of the COVID-19 virus.

## Relief Under Revenue Procedure 2020-20

Addressing this tax residency issue for such foreigners stuck in the United States, the new Revenue Procedure 2020-20 creates a new exclusion, the “COVID-19 Medical Condition Travel Condition.” This exclusion allows a qualifying alien (an “Eligible Individual” as defined in Section 3.04 of Revenue Procedure 2020-20) who intended to leave the United States during the individual’s “COVID-19 Emergency Period,” but was unable to do so due to the current “COVID-19 Emergency Travel Disruptions,” to exclude the individual’s COVID-19 Emergency Period from their day-count under the substantial presence test. This excluded COVID-19 Emergency Period extends for a period of up to 60 calendar days of continuous presence in the United States which commences between February 1 and April 1, 2020. Further, “an Eligible Individual will be presumed unable to leave the United States for purposes of the substantial presence test on any day during the individual’s COVID-19 Emergency Period.” The COVID-19 Emergency itself is considered a medical condition, but not a pre-existing one.

Thus, the date on which the alien must leave the United States in 2020 is extended up to 60 consecutive days, beyond the date he would otherwise have to leave, in order to avoid resident alien status for the year (assuming no disqualifying return to the United States for the alien in the balance of 2020 or that he has applied or otherwise taken steps to become a lawful permanent resident of the United States). Thus, for aliens with a full 60-day COVID-19 Emergency Period and entitled to use the closer connection exception, this means they may be able to stay up to a total of 242 days, not just 182 days in 2020. The Procedure specifically confirms that an alien individual can combine their excluded days of US presence under the COVID-19 Medical Condition Travel Exception with the closer connection exception. Still, given that 82 days (as at April 21) have passed since February 1, the day count is mounting, so clients stranded in the United States since February must remain vigilant with their day counts based on their own individual circumstances.

Importantly, for those foreigners who must file a nonresident tax return – Form 1040NR (e.g., filing is required to report US business income), in order to claim this new medical condition exception, the Procedure requires proper filing of Form 8843 – Statement for Exempt Individuals and Individuals with a Medical Condition, as detailed in the Procedure. For those who are not otherwise required to file Form 1040NR, there is no form filing requirement to get the relief under the Revenue Procedure. Those not required to file currently can later file Form 8843 if the IRS challenges the individual’s nonresident status for tax years 2020, 2021 or 2022. Complete and accurate records related to the COVID-19 Emergency Period must be kept by all regardless whether or not the current filing of Form 8843 is required.

## Relief Under Revenue Procedure 2020-27

In addition to addressing the issue of foreigners stuck in the United States due to the Covid-19 emergency and the potential impact of their extended stay on their US tax residency status, the IRS concurrently issued a second [Revenue Procedure 2020-27](#) to address the separate issue of US taxpayers residing abroad and claiming the exclusion from income for “foreign earned income” under Section 911 where they have had to return early to the United States due to the pandemic, thereby jeopardizing their qualification to claim to the Section 911 exclusion.

[Revenue Procedure 2020-27](#) allows that The Secretary of the Treasury has determined that the global health emergency caused by the outbreak of COVID-19 is an adverse condition that disrupts the normal conduct of business globally. Therefore, relief is provided to any US individual who reasonably expected to become a “qualified individual” in order to claim the foreign earned income exclusion under section 911 but left the foreign jurisdiction during the period described in this revenue procedure. And, while being stuck in the United States does not prevent someone from having a bona fide residence in another country for section 911 purposes, only earned income attributable to the time actually spent outside the US can be excluded under this guidance. Thus, if an individual was receiving earned income from a foreign employer while stranded in the United States, US tax must be paid on this US portion of earned income.

Additionally, online “[Frequently Asked Questions](#)” provide that certain US business activities carried on by a nonresident alien or foreign corporation will not be counted for up to 60 consecutive calendar days for purposes of determining whether the (foreign) individual or entity has a US permanent establishment or is engaged in a US trade or business, but only if those activities would not have been conducted in the United States except for travel disruptions arising from the COVID-19 Emergency.

Finally

In conclusion, the Treasury Department and the IRS basically gave foreigners up to 60 days of US physical presence during which the individual is treated as not in the United States. These extra days apply not only for section 7701(b) residence, but for time stranded working in the United States that might otherwise cause a business to have a permanent establishment here, as well as for time stranded in the United States which might prevent someone from qualifying for section 911 relief. Most importantly, this guidance provides some certainty and limited relief to those caught unaware and unexpectedly in the United States due to COVID-19.

If you need advice on any of the areas covered by this article, please contact Withers immediately. For many foreigners, their residence position can be quite nuanced. Foreigners who have become trapped in the United States due to the pandemic will want to act quickly on this residency issue in order to avoid prejudicing their nonresident tax status.


In accordance with our business continuity planning, our attorneys are working flexibly in a number of locations to support our clients at this uncertain time.


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