Transferring Foreign Personnel To The United States

Legal & Tax Considerations

GIBNEY ANTHONY & FLAHERTY LLP

GIBNEY, ANTHONY & FLAHERTY, LLP
Attorneys at Law
665 Fifth Avenue, New York, New York 10022
Telephone: (212) 688-5151
Facsimile: (212) 688-8315

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U.S. visa considerations require careful planning well in advance of travel, since processing times can be lengthy. Tax ramifications of the various visa options should also be considered (see the Real Estate, Income Tax, Employment Taxes and Estate Planning sections).

The threshold question for persons to be transferred to the U.S. is whether they are nonimmigrants or immigrants. Nonimmigrants come to the U.S. temporarily to carry on activities in accordance with specific terms of a nonimmigrant visa. Immigrants are permitted to enter the U.S. pursuant to an immigrant visa, and may reside in the U.S. indefinitely in Lawful Permanent Resident status (evidenced by a "green card").

In most cases, persons seeking to enter the U.S. are presumed to be intending to immigrate. With limited exceptions, nonimmigrants must prove to the U.S. Consulate and the inspecting immigration officer at the port of entry to the U.S. that they intend to depart the U.S. at the conclusion of their temporary visit.

Some nonimmigrant visas require an approved visa petition from the U. S. Immigration and Citizenship Services (USCIS) in the U.S. before application for a visa can be made at the U.S. Consulate abroad.

NONIMMIGRANT VISAS

Visas Requiring No Prior Petition

B-1 Business Visa

B-1 visas are available to persons coming to the U.S. temporarily to do business on behalf of their foreign employer. They are not permitted to engage in local labor for hire, and must:

- be compensated by the foreign employer (U.S. company reimbursement of expenses is permitted); and,
- maintain a permanent residence overseas, which they have no intention of abandoning.

Notwithstanding the B-1 visa validity period, the authorized period of stay for the B-1 visa holder will be determined by the inspecting immigration officer at the port of entry to the United States, consistent with the purpose of the visit. Generally the admission period will not exceed a period of six months. Extensions of stay may be granted if a legitimate business need for the individual can be demonstrated.

Business persons from select countries may apply for admission to the U.S. without a visa through the Visa Waiver Program. Participants must still meet the usual eligibility criteria for a B-1 visa and must be in possession of a round-trip ticket and a machine-readable passport. Additionally, all passports issued on or after October 26, 2006 must be "e-Passports" containing a digitized photograph and an integrated chip with information from the passport data page.

Prior to traveling to the U.S., the Visa Waiver traveler must apply for and obtain an ESTA Travel Authorization at www.cbp.gov. ESTA travel authorization is valid for travel for two years, and may be renewed indefinitely.

Admission to the U.S. pursuant to the Visa Waiver Program is limited to a maximum period of 90 days, without eligibility to change to another status or extend status once in the U.S.

E Treaty Visa

E visas are available to individual entrepreneurs or company employees who are executives, managers or in possession of essential skills.

In each case, the visa holder and the applying company must be a national of a country that has a Treaty of Friendship, Navigation and Commerce or similar agreement with the U.S.

The nationality of a company is determined by the nationality of those who own at least 50% of the company. Publicly held companies are generally presumed to hold the nationality of the place in which their stock is principally traded.

E-1 Treaty Trader visas require:

- an actual and substantial exchange of goods or services; and,
- that over 50% of the total volume of trade conducted in the U.S. be between the U.S. and the treaty country.

E-2 Treaty Investor visas require that:

- the investment be substantial and expand job opportunities; and,
- funds are placed at risk and subject to loss.

E visas are normally issued for five years. Spouses and children under 21 years of age are eligible for E dependent visas, and spouses are eligible for employment authorization.

E-3 Specialty Occupation Visa – Australia

Citizens of Australia who come to the U.S. for employment in a specialty occupation are eligible for E-3 visas. To qualify:

- the position in the U.S. generally must require a specific baccalaureate or higher degree (or its equivalent) as the minimum entry-level requirement; and,
- the employee must possess such a degree, or its equivalent through well documented employment experience.

Before the foreign worker may apply for an E-3 visa at the U.S. Consulate, the employer must file a Labor Condition Application ("LCA") with the Department of Labor. The LCA form requires the employer to attest that:

- the E-3 worker will be paid the required wage rate;
- the employment of the E-3 worker will not adversely affect the working conditions of similarly situated U.S. workers;
- as of the date of filing the LCA, there is no strike or lockout involving the position; and,
- notice of the hiring of the E-3 alien for the position has been provided to the bargaining representative or has been posted in two conspicuous places where the E-3 worker will be employed.

To support these attestations, the employer must develop and maintain certain documentation during the full term of the E-3 worker's employment.

Once the LCA is obtained, the foreign national may apply for the E-3 visa at the U.S. Consulate.

There is no maximum permissible period of stay in E-3 status; however, applicants must demonstrate that they have no intention to permanently immigrate to the U.S. Spouses and dependent children under 21 years of age are eligible for E-3 dependent visas and spouses are eligible for employment authorization. Dependents are not required to hold Australian citizenship.

J-1 Exchange Visa

J-1 visas are available to participants in an exchange program sponsored by an organization or institution designated by the U.S. Department of State.

J-1 visas are commonly used by corporations for training foreign personnel for up to 18 months.

J-1 visas:

- may involve a two-year home residence requirement; and,
- carry special tax features under the Internal Revenue Code.

TN (Treaty NAFTA) Visas
TN status is available for Canadian and Mexican professional workers seeking entry to the U.S. to work in one of the professional occupations specified in NAFTA. The required qualifications for each occupation are set forth in NAFTA and generally require a bachelor's degree in a directly related field.

A Canadian national TN applicant may present a TN application at a U.S. port of entry for immediate adjudication by an immigration inspector. Non-Canadian dependents and all Mexican nationals applying for TN status under NAFTA must first apply for a visa at a U.S. Consulate. To secure TN nonimmigrant status, Canadian and Mexican applicants must provide the following:

- proof of qualifying citizenship;
- supporting statement from the employer with a full description of the nature of the duties to be performed by the applicant, the anticipated length of stay, and salary;
- proof of beneficiary's educational qualifications and/or work experience as required under NAFTA; and,
- proof of licensure, if required.

A TN worker may be initially admitted to the U.S. for a period of up to three years. Additional extensions of stay may be obtained in three-year increments. There is no maximum permissible period of stay; however, applicants must demonstrate that they have no intention to permanently immigrate to the U.S. Dependent spouses and children under 21 years of age are eligible for TD status but are not permitted to work. Dependents are not required to hold Canadian or Mexican citizenship.

VISAS REQUIRING A PETITION

L-1 Intracompany Transferee Visa

L-1 visas are available to intracompany transferees. To qualify:

- the company must be doing business in the U.S. and at least one other country;
- the employee must have worked abroad for the overseas company for one full year in the last three years in an executive, managerial or specialized knowledge capacity; and,
- the employee must be transferred to a branch, parent, subsidiary or affiliate of the overseas company to work in an executive, managerial or specialized knowledge capacity.

The L-1 visa is initially valid for up to three years. An extension is generally permitted in two-year increments for a total of seven years for an executive and managerial employee and five years for a specialized knowledge employee. If the U.S. office has been doing business for less than one year, the visa is initially valid for one year only, but may be renewed for full validity if the U.S. business has sufficiently expanded after the initial year.

Spouses and children under 21 years of age are eligible for L-2 dependent visas and spouses are eligible for employment authorization.

H-1B Specialty Occupation Visa

H-1B visas are available to workers who come to the U.S. for employment in a specialty occupation. To qualify:

- the position in the U.S. generally must require a specific baccalaureate or higher degree (or its equivalent) as the minimum entry-level requirement; and
- the employee must possess such a degree, or its equivalent through well documented employment experience.

Before an H-1B visa can be obtained, the employer must file an LCA with the Department of Labor. The LCA form requires the employer to attest that:

- the H-1B worker will be paid the required wage rate;
- the employment of the H-1B worker will not adversely affect the working conditions of similarly situated U.S. workers;
- as of the date of filing the LCA, there is no strike or lockout involving the position; and,
- notice of the hiring of the H-1B worker for the position has been provided to the bargaining representative or has been posted in two conspicuous places where the H-1B worker will be employed.

To support these attestations, the employer must develop and maintain certain documentation during the full term of the worker's employment.

Upon obtaining the LCA, the employer must then file a petition for H-1B classification with USCIS. Upon approval of the petition, the foreign worker may apply for an H-1B visa at the U.S. Consulate.

H-1B visa status is initially valid for up to three years. Extensions are available for an additional three years. In certain limited circumstances, H-1B status may be extended beyond six years. Spouses and children under 21 years of age are entitled to H-4 derivative visas but are not authorized to work.

H-1B1 Specialty Occupation Visa – Chile and Singapore

Citizens of Chile and Singapore are eligible for the H-1B1 visa. Similar to the H-1B visa, the H-1B1 is available to workers who come to the U.S. for employment in a specialty occupation. Specifically:

- the position in the U.S. must generally require a specific baccalaureate or higher degree (or its equivalent); and,
- the employee must possess such a degree, or its equivalent employment experience.

Like the H-1B, the employer must first obtain an LCA for the employment from the Department of Labor. However, unlike the H-1B, employers are not required to file a petition for H classification with USCIS in the U.S. Once the LCA is obtained, the foreign worker may apply for his or her H-1B1 visa at a U.S. Consulate.

H-1B1 visa status is initially valid for one year, and may be extended in one-year increments. There is no maximum permissible period of stay; however, applicants must demonstrate that they have no intention to permanently immigrate to the U.S. Spouses and children under 21 are eligible for H-4 dependent visas but are not authorized to work.

<u>O-1 Visa</u>
Persons eligible for this classification include those with extraordinary ability in the sciences, arts, education, business or athletics, demonstrated by sustained national or international acclaim and recognition. Note that:

- only one who has risen to the very top of his field qualifies for an O visa; and,
- substantial documentation evidencing the worker's extraordinary ability must be submitted to USCIS.

The O-1 nonimmigrant may be admitted for the time period necessary to accomplish the proposed event or activity, not to exceed three years. Extensions may be granted in one-year increments. There is no maximum permissible period of stay for O visa holders; however, applicants must demonstrate that they have no intention to permanently immigrate to the U.S. Spouses and children under the age of 21 are eligible for O-3 derivative status, but are not authorized to work.

IMMIGRANT VISAS

Applications for immigrant visas or "green cards" may be made to the U.S. Consulate or the U.S. Citizenship and Immigration Services (USCIS) (circumstances permitting) by foreign workers who:

- are the beneficiaries of approved employment-based preference petitions;
- where applicable, have obtained labor certification from the Department of Labor that there are no qualified U.S. workers able and willing to do the job; and
- hold a priority date that has been reached on the Department of State Visa Bulletin.

There are 140,000 visas available annually for employment-based immigration. The main preference categories for transferring foreign workers are:

I. First Preference Priority Workers
First preference workers include:

- Key managers and executives who have been employed outside the U.S. by a branch, parent, subsidiary or affiliate of the U.S. employer for one full year in the three years preceding entry.
- Outstanding professors and researchers at universities or private employers with established research departments.
- Aliens of "extraordinary ability" in the sciences, arts, education, business and athletics.

II. Second Preference Workers
Second preference workers include:

- Members of the professions holding advanced degrees (i.e., a Master's degree or higher or the equivalent).
- Aliens of exceptional ability in the arts, sciences or business who will substantially and prospectively benefit the national interest and welfare of the U.S.

III. Third Preference Workers
Third preference workers include:

- Professional workers filling U.S. positions requiring a Bachelor's degree.
- Skilled workers coming to the U.S. to fill positions requiring at least two years of experience.
- Unskilled workers coming to the U.S. to fill positions requiring less than two years of experience.

Labor Certification
The labor certification process applies to most second and third preference categories and requires that the employer undertake certain pre-filing recruitment activities, including advertising the job in a newspaper of general circulation and at the company's offices, to establish that there are no qualified U.S. workers willing and able to fill the position.

Priority workers are exempt from the labor certification requirement as are certain persons of exceptional ability in the arts, sciences and business if their work is in the national interest.

The filing of a labor certification application with the Department of Labor determines the foreign national's priority date, and the subsequent approval of an employment-based preference petition places the foreign national in the queue for green card issuance based on the priority date. The priority date for priority workers and other workers exempt from the labor certification requirement is determined by the filing of the employment-based preference petition with USCIS. The green card may not be issued to the foreign worker until his or her priority date is reached on the Department of State's monthly Visa Bulletin.

Naturalization
U.S. Lawful Permanent Residents may be eligible for naturalization to U.S. citizenship. In most cases, immediately before filing the naturalization application with USCIS, applicants for naturalization must have:

- resided in the U.S. for five years as Lawful Permanent Residents (three years if married to a U.S. citizen);
- been physically present in the U.S. for at least two and one-half years of the residence period (one and one-half years if married to a U.S. citizen); and,
- resided in the state in which the naturalization petition is filed for at least three months.

Articles arriving in the U.S., including merchandise in the possession of an individual arriving at a U.S. port of entry, must clear Customs and are subject to duty unless specifically exempt. Customs clearance involves a number of steps including inspection, entry, valuation, classification and liquidation.

PERSONAL EXEMPTIONS FROM CUSTOMS DUTIES:

Resident v. Non-Resident

Duty rate benefits vary depending on whether the person arriving in the U.S. is a U.S. resident or a non-resident. Substantially greater duty exemptions are available to non-residents. Residence is determined on a case by case basis by the Customs official at the U.S. port of entry. Factors include:

- The circumstances of the individual's arrival in the U.S.
- Whether the person was abroad for a fixed or indefinite time.
- The person's intent at the time of any prior departure from the U.S.
- The ties the person maintained with the U.S. while abroad.
- Maintenance of a home in the U.S.
- Whether the employment abroad was for a fixed or indefinite period.
- Any other fact concerning the person's prior stays in the U.S.

No single factor is determinative.

All persons arriving in the U.S. must declare articles brought into the U.S. on a Customs Declaration, Form 6059B. Persons seeking entry of household goods free from duty should complete and file Customs Form 3299. In addition, upon each departure from and arrival into the U.S., all persons possessing more than $10,000.00 of currency or monetary instruments (U.S. or foreign, in coin, currency, travelers checks, money orders, checks, stocks or bearer bonds) must make proper declaration with Customs on FinCEN Form 105. Misstatements of fact can result in civil and criminal penalties.

Principal Exemptions for Non-Residents

A non-resident arriving in the U.S. may import the following free of duty:

- Wearing apparel, articles of personal adornment, toilet articles and similar personal effects if actually owned by and in the passenger's possession while abroad, and if for personal use only and not intended for sale or for another person 5 use.
- Automobiles, bicycles, boats and similar means of transportation for personal use in the U.S. by the non-resident, his family and guests.
- Gifts not exceeding $100.00 in aggregate value (not including alcoholic beverages and cigarettes but including not more than 100 cigars) in the passenger's possession, if the person remains in the U.S. for at least 72 hours and has not claimed the exemption during the prior six months.
- Not more than 50 cigars or 200 cigarettes, or two kilograms of smoking tobacco, when brought in by an adult for personal use.
- Not over one liter of alcoholic beverage when brought in by an adult for personal consumption.

Principal Exemptions for Residents

Exemptions from duty available to returning residents (including American citizens who are residents of American Samoa, Guam or the U.S. Virgin Islands) include:

- Personal and household effects taken abroad by or for the resident. The resident may register the personal effects prior to departure by completing and filing Customs Form 4457.
- Automobiles rented by the resident while abroad and imported for transportation of the resident, his family and guests.
- Other articles acquired abroad by the resident for his personal or household use and not intended for any other person or for sale, provided that the resident arrives from the U.S. Virgin Islands, or a contiguous country with a free zone or free port, or any other country if the resident was outside the U.S. at least 48 hours and has not claimed any of the following exemptions within the preceding 30 days:

  – articles which accompany the resident arriving from abroad and which have an aggregate fair retail value of not over $800.00 in the country where acquired, including not more than one liter of alcoholic beverages, 200 cigarettes and 100 cigars, when brought in by an adult (21 years of age or older);

  – articles which are brought in by or for the account of a resident arriving directly or indirectly from American Samoa, Guam or the U.S. Virgin Islands ("insular possessions"), and which have an aggregate fair market value of not over $1,600.00, if the articles are acquired in such insular possessions. Under this exemption, greater quantities of alcoholic beverages, cigarettes and cigars, if acquired in such insular possessions, are allowed free of duty;

  – articles which are brought in by or for the account of a resident arriving directly or indirectly from certain "beneficiary" countries (primarily, certain Caribbean countries), and which have an aggregate fair market value of not over $800.00, if such articles are acquired in such beneficiary countries. Under this exemption, greater quantities of alcoholic beverages, if acquired in such beneficiary countries, are allowed free of duty.

  – medals, trophies and other prizes made of metal, bestowed upon the resident while abroad; and

  – game animals killed abroad and imported for noncommercial purposes by the resident.

There are other specific exemptions from duty that may apply to residents or non-residents arriving in the U.S. In all cases, the arriving passenger should recognize that the transfer of goods that received an exemption from U.S. duty is restricted.

NAFTA (North American Free Trade Agreement)
Implemented on January 1, 1994, NAFTA provides that U.S. residents who return from Canada or Mexico (directly or indirectly) are eligible for free or reduced duty rates on goods originating in Canada or Mexico.

Admissibility of Pets
A resident or non-resident planning to enter the United States with a pet should be aware of the requirements governing whether or not the pet will be released to the owner at the time of arrival. The requirements include:

- a general and overall healthy appearance at the time the animal arrives at the United States border;
- acceptable proof that the animal has all necessary vaccinations and inoculations;
- presentation of any required CITES (Convention of International Trade on Endangered Species) import and/or export permits;
- presentation of any special permit(s) under the Endangered Species Act;
- presentation of a current valid health certificate issued by a licensed veterinarian in the country from which the animal last resided; and
- possible mandatory quarantine periods.

The above requirements are further contingent and/or depend upon variables, which include:

- the type and/or species of animal;
- the country in which the animal last resided;
- the country of birth of the animal;
- the age of the animal; and
- the method of transportation.

Most personnel transferred to the U.S. initially lease a residence. After a period of time, many purchase a house or an apartment. Acquiring a home in the U.S. involves the following steps:

- Locating the home through a real estate broker.
- Signing the purchase contract and paying a deposit.
- Obtaining financing.
- Receiving a deed or other title document upon paying the balance of the purchase price.

The buyer's attorney should be consulted at the beginning of the process to assist with negotiations and to document the transfer.

Companies transferring employees often reimburse the out-of-pocket costs of purchasing a new home (see the Income Tax section). Costs vary according to the location and price of the home.

The most common costs include:

- Fees charged by the lender.
- Bank's attorney's fees.
- Land surveys.
- Termite certifications.
- Title and mortgage insurance.
- Recording taxes.
- Buyer's attorney's fees.

A more detailed explanation of the mechanics of purchase can be found in Gibney, Anthony & Flaherty's brochure "Purchasing A Residence in New York." The brochure also covers the acquisition of co-operative and condominium apartments.

The sale of a foreign home and the purchase of a new one in the U.S. require careful tax planning.

Gain on the sale of an overseas home is taxable in the U.S. only if the owner is a U.S. resident or citizen (see the Income Tax section). If the home to be sold is in the U.S., gain on the sale is taxable regardless of the owner's residence. However, if the U.S. home serves as the personal residence of the owner, the gain is excludible up to certain limitations. A single person or a person filing their tax return as married filing separately may exclude up to $250,000 of gain. A couple filing their tax return as married filing jointly may exclude up to $500,000 of gain. Note that the house being sold must have been used as the personal residence for two of the last five years. Also, the owners must not have sold a house within the last two years

and availed themselves of this exclusion. Failing to satisfy these requirements reduces the exclusion amount.

The exclusion is further reduced for individuals and couples who own more than one home. For these individuals and couples the exclusion is limited by the percentage of time the property is not used as a personal residence. However, periods of non-use prior to December 31, 2008 do not count as non-use.

The I-9 Requirement

The Immigration Reform and Control Act of 1986 (IRCA) imposes significant compliance obligations on U.S. employers in the hiring of all personnel, U.S. or foreign. In particular, IRCA imposes fines and penalties on U.S. employers who:

- knowingly hire an alien who is not authorized to work in the U.S.; or
- fail to complete Employment Verification Form I-9.

Completion of Form I-9 by both employer and employee is a defense to the charge of knowingly hiring an alien who is not authorized to work.

Foreign personnel transferred to the U.S. must show proof of identity and work authorization within three days after beginning employment.

Acceptable documentation for foreign personnel includes:

- resident alien card (green card); or
- unexpired foreign passport bearing an I-94 arrival record with an unexpired employment authorization endorsement.

Employment Agreements – General

Employment agreements are not required. When used, there are two types: formal contracts and informal letter agreements. Formal contracts are usually more detailed than letter agreements, which cover only basic points.

Letter Agreement

Letter agreements should contain at least the basic obligations of the parties. At a minimum, letter agreements should include:

- The amount of base pay.
- Whether the agreement is for a fixed term or terminable at will.
- The services to be performed by the employee.

Other items often covered in letter agreements for U.S. employees include:

- Severance pay (the agreement can specify the amount and the circumstances giving rise to severance pay).

However, U.S. law usually does not require severance pay.
- A summary of stock options, bonuses, vacation and other fringe benefits.

Formal Contract

A formal employment contract generally contains all items of a letter agreement, in more detail.

For example, while a letter agreement may provide that an employee will be entitled to vacation in accordance with company policy, the formal contract will usually specify the number of weeks of vacation.

The formal employment contract may also contain the following:

- Specific bonus plan or formula.
- Details of stock options and other fringe benefits.
- The employee's title.
- Timing of salary increases.
- Termination for cause.
- Rights and obligations on termination.
- Location of employment.
- Arbitration of claims.
- Choice of law.
- Termination events (such as changes in title, authority, duties or responsibilities).
- Payments upon change of control of the company.
- Noncompetition and secrecy agreements.

Special Provisions For Inbound Employees

Additional items to consider in an employment agreement (formal or informal) with an employee transferring to the U.S. are:

- Expected length of assignment (can be flexible).
- Whether the employee will be paid by the parent company or the U.S. company.
- Tax equalization adjustments (see the Income Tax section).
- Participation in U.S. social security or home country system.
- Foreign service incentives.
- Visa considerations (see the Immigration section).
- Participation in U.S. and non-U.S. pension plans (see the Compensation and Benefit Plans section).
- Vacation and home leave.
- Reimbursement of moving expenses to the U.S. and back. Note that certain nonimmigrant aliens may be entitled to reimbursement of return transportation costs upon early termination of employment.
- Fringe benefits such as medical and life insurance, company car, club dues, etc.
- Educational benefits for dependents.
- Reimbursement for tax return and estate planning services.

Employment At Will

Employers and employees often do not specify the duration of employment. This employment relationship is called "at will," and may be terminated at any time by either party. However, an employer cannot base employment decisions on discriminatory reasons. The right to terminate at will can be very useful to employers, but can be limited. For example, oral or written statements (such as those in company policy manuals) can act as employment contracts. In addition, the relationship between immigrant petitions filed by employers and the employment status of foreign employees should be agreed to in advance. If the employer intends "at will" status for immigrant employees, the employment agreement should so state.

Family and Medical Leave Act

Under federal law, the Family and Medical Leave Act entitles most employees to twelve weeks of unpaid leave for the birth and care of a newborn child (or the placement of a child for adoption or foster care), to care for a seriously ill spouse, child or parent or to care for the employee's own serious health condition. Employees on leave are entitled to return to a substantially equivalent position with no loss of benefits. Detailed eligibility rules apply. Several states have similar laws that may provide additional benefits.

Compliance With Laws Against Discrimination

Employers must be aware of federal, state and local laws prohibiting employment discrimination. While these laws vary, in general they bar discrimination based on race, religion, age, sex, national origin and disability. Some local governments, such as New York City, also prohibit discrimination based on sexual orientation, citizenship and marital status. Title VII of the Civil Rights Act of 1964 prohibits discrimination because of race, color, religion, sex or national origin. Title VII applies to aliens, but does not cover discrimination based solely on alienage or non-U.S. citizenship. Title VII applies only to employers with fifteen or more employees.

IRCA

IRCA forbids discrimination based on national origin or citizenship with respect to hiring, recruitment, and referral for a fee or discharge. IRCA applies to employers with at least four employees.

Treaties

Many countries have treaties of Friendship, Commerce and Navigation (FCN) with the U.S. The FCN treaty allows a foreign employer to discriminate in favor of its citizens in filling certain executive and technical positions in its U.S. operations. However, employers are liable for any other discrimination that is prohibited by federal, state or local law.

QUALIFIED AND NONQUALIFIED PLANS

Plans providing tax-deferred compensation fall into two basic categories:

- Tax-qualified plans.
- Nonqualified plans.

Qualified Plans

Qualified plans provide four principal tax advantages:

- The employee is not taxed until money is actually paid to him (not when funded by the employer).
- The employer receives a tax deduction for the year the money is paid to a trust for the employees' benefit.
- Earnings on the trust fund accumulate tax-free.
- The funds contributed to the trust may not be reached by creditors of the employer.

Qualified Plans have the following disadvantages:
- They are subject to a variety of complex requirements under the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA).
- They are subject to strict nondiscrimination rules and cannot be designed for individual employees.
- Distributions prior to retirement are usually subject to a U.S. tax penalty.

Note: Distributions from the plan may be taxable even though the employee has given up U.S. residence.

There are two basic types of Qualified Plans:

- Defined Benefit Plans.
- Defined Contribution Plans.

A Defined Benefit Plan is a plan that provides a fixed benefit on retirement (usually a life annuity).

A Defined Contribution Plan has a formula (fixed or flexible) that determines how contributions will be made by the employer and allocated to the plan's participants. Each participant has a separate account balance and retirement benefits are limited to the participant's account balance.

Types of Defined Contribution Plans are:

- Profit Sharing Plan

Each employee has a separate account balance, generally subject to a vesting requirement. Employer contributions are usually a percentage of compensation and often vary based on the employer's earnings.

- 401(k) Plan

A type of profit sharing plan that allows employees to defer a portion of their income. Employees are not taxed on such amounts or earnings thereon until withdrawal.

- Savings Plan

A type of profit sharing plan that is often part of a 401(k) plan. Employees may contribute a percentage of salary (usually no more than 15%), and the employer contributes a "match" amount based on the employee's contribution. A common matching formula compensation is an employer match of $.50 for each $1.00 of employee contribution up to 6% of salary.

- Money Purchase Pension Plan

The employer must contribute a fixed percentage of each participant's compensation each year.

Coordination of Benefits

Employers must determine how U.S. plans will relate to home country plans to:

- avoid duplication of benefits and associated costs; and
- avoid unintended loss of benefits by transferred employees; and
- avoid unintended tax consequences.

Employers must consider the U.S. income tax implications of continued participation in a home country plan, as well as the home country income tax implications of participation in U.S. plans.

Nonqualified Plans

Nonqualified plans, which can be either funded or unfunded, provide the following tax advantages:

- The employer may select the employees who will participate.
- Nonqualified plans may be less expensive than tax-qualified plans (which must have broad coverage).
- An employee does not generally recognize income under an unfunded arrangement until payments are received or made available. (Funded plan contributions are usually included in the employee's gross income when the plan is funded.)

Nonqualified plans have the following disadvantages:

- In an unfunded arrangement, the employer generally does not get a deduction until the employee is paid the benefit. (In a funded plan, the employer gets an immediate deduction.)
- The employee is a general creditor of the employer, and his deferred compensation is not protected if the employer becomes insolvent.
- Funding arrangements known as "Rabbi Trusts" are often used. These arrangements are generally treated as unfunded plans provided the funded amounts are available to general creditors of the employer in the case of the employer's insolvency.
- The rules applicable to nonqualified plans are complex and errors in plan drafting or administration can result in significant penalties.

Review of Compensation Arrangements (for "409A")

The addition of section 409A to the Internal Revenue Code effective January 1, 2005 made it essential that all of an employee's continuing compensation arrangements be reviewed prior to the time the employee is transferred to the United States.

Arrangements that should be reviewed include all foreign retirement and pension plans, bonus plans (both long term and short term) pursuant to which the employee may be entitled payment or accrual of additional benefits after being transferred to the U.S., all employment agreements and employment letters, severance agreements, expense reimbursement agreements, and tax gross up and tax equalization plans. A determination must be made that each plan, arrangement or agreement either complies with or is exempt from the requirements of 409A.

Failure of any such plan or arrangement to comply with or be exempt from 409A can result in significant penalties on the employee.

HEALTH AND LIFE INSURANCE PLANS

Health

Most U.S. employers have some form of contributory health plan for employees.

- The portion of health insurance costs paid by employees has increased in recent years.
- Types of plans and levels of employer contribution vary greatly (HMOs vs. indemnity plans, dental plans, etc.) among U.S. employers, and often within a single company.
- Larger employers may self insure all or part of the medical benefits provided to their employees and hire a third party to administer and pay claims.

Life

A limited amount of term life insurance coverage (up to $50,000.00) can be provided to employees tax-free.

All or part of the cost of term coverage below $50,000.00 may be taxable to highly compensated employees if the plan discriminates in favor of highly compensated employees.

Residence Versus Nonresidence

Foreign persons who work and derive income in the U.S. are taxed either as residents or nonresidents.

Residents are taxed on worldwide income. Nonresidents generally are taxed only on U.S. source income.

Compensation for personal services performed in the U.S. is "U.S. source income", regardless of the payor's location.

There are two tests to determine tax residence:

Lawful Permanent Resident Test

- An alien becomes a lawful permanent resident of the U.S. on the date he obtains a green card (see the Immigration section).
- Residence continues until immigrant status is revoked or is determined (administratively or judicially) to have been abandoned.

Substantial Presence Test

A nonimmigrant will be a resident for tax purposes if one of the following applies:

- the individual is in the U.S. for 183 or more days during any calendar year; or
- the individual is in the U.S. for at least 31 days during any year, and the number of days he is in the U.S. for such year, when added to 1/3 of the days in the U.S. for the preceding year and 1/6 of such days for the second preceding year, equals at least 183.

Although an individual would otherwise meet the three-year test described above, he will not be treated as a resident for tax purposes if he:

- is present in the U.S. for less than 183 days in the current year;
- maintains a tax home in a foreign country during the current year; and
- has a closer connection during the current tax year to one foreign country in which he has a tax home than to the United States.

Expatriate Provisions

A long-term U.S. resident (generally defined as an individual who was a Lawful Permanent Resident of the U.S. in at least eight out of the last 15 years) who ceases to be a Lawful Permanent Resident of the U.S. for tax avoidance purposes, is generally treated as a U.S. citizen who lost U.S. citizenship on the date his U.S. residence ends. The cost of surrendering citizenship or long term residence, if the expatriate meets certain qualifications, is that there is an income tax on the net unrealized gain on worldwide property. The tax only

applies if the gain exceeds $600,000 adjusted for inflation. Specific rules apply to deferred compensation, basis of property for the purpose of determining gain and elections to defer some or a portion of the tax.

Perhaps the most costly provision in these new expatriation rules is the Estate Tax. Please see section on Estate and Gift Tax.

Tie-Breaking Rules

Tax treaties with various countries contain tie-breaking rules for persons who could be deemed resident of both the U.S. and a foreign jurisdiction. Factors are:

- Location of permanent home.
- Center of vital interests.
- Location of habitual abode.
- Country of nationality.
- Discretion of competent authorities.

Income

Gross income means all income from whatever source, including compensation for services, fringe benefits, property gains, interest, dividends, annuities, pensions, etc.

- Fringe benefits such as company cars, product discounts, home leave reimbursements and tuition reimbursements are generally taxable unless covered by certain narrow exceptions (such as group term life insurance and employer-provided coverage under an accident or health plan).
- Employer contributions to non-US qualified benefit plans and non-U.S. deferred compensation plans may be currently taxable (see the Compensation and Benefit Plans section).

Deductions and Credits

Resident aliens may reduce income by certain itemized deductions which, subject to various limitations, include:

- Medical expenses.
- Certain interest expenses.
- State and local income and real estate taxes.
- Casualty and theft losses.
- Business-related expenses not reimbursed by the employer.
- Charitable contributions.

Nonresident aliens can generally only claim itemized deductions if they have income effectively connected with a U.S. trade or business.

Certain taxes paid to a foreign country on income outside the U.S. which is also taxable in the U.S. will be a credit offsetting the U.S. tax.

State and Local Taxes

In addition to federal income tax, most states and many large cities impose income taxes.

- State and local taxes are usually based on income as reported on the federal tax return.

- Nonresidents of state and local taxing jurisdictions can be taxed on income earned in that jurisdiction.

Tax Reimbursements

Companies transferring personnel to different jurisdictions can adopt a tax balancing policy, often known as tax protection or tax equalization.

- These policies are meant to render the employee indifferent to individual tax rates from country to country.
- They may also be used to deliver certain benefits net of tax cost.
- Tax protection involves reimbursement to the employee by the employer for the difference between taxes actually paid and a "hypothetical" tax.
- The hypothetical tax (set by the employer) is generally an estimate of what the employee's tax would have been had he worked at home, based on total compensation, other income and deductions taken into account under the home country tax laws.
- If the taxes actually paid are less than the hypothetical tax, the employee need not refund the difference.

Tax equalization denies the employee the benefit of lower tax rates in the foreign location.

- The employee is liable for the hypothetical tax, whether higher or lower than the actual tax. If the actual tax is less in the new jurisdiction, the employee pays the employer the difference.
- Reimbursements to the employee are generally taxable in the U.S. if the employee is a U.S. resident. However, taxable reimbursements can be "grossed up" to cover the tax on the reimbursement.
- Reimbursement arrangements including tax gross up, tax equalization, and moving expense reimbursement must be structured to comply with, or be exempt from, U.S. rules relating to deferred compensation.
- Moving expenses (such as travel, transport of household goods and temporary living expenses) reimbursed after the employee becomes a U.S. resident are taxable, but may be partially offset by a "moving expense" deduction.

In the years of arrival and departure, the employee may be resident for part of the year and nonresident for the remainder.

- Some employers reimburse employees for any additional tax resulting from such "dual-status."

The U.S. has two separate employment tax systems.

- The Federal Insurance Contributions Act (F.I.C.A.) requires that employers and employees pay matching taxes.
- The Self-Employment Contributions Act (S.E.C.A.) imposes a tax on self-employed persons. This tax is equal to the employer and employee share of F.I.C.A. tax.

A contributor to these tax systems who has accumulated the requisite number of “quarters” of coverage may be entitled to retirement, survivors, disability and Medicare benefits.

F.I.C.A. Tax

- Imposed on any service performed within the U.S., regardless of tax residence or number of days spent in the U.S.
- B, E, H, L, O and P visa holders who perform services in the U.S. for as little as one day, even if on behalf of a foreign employer, are generally subject to F.I.C.A. tax.
- Exemptions are generally available to F, J, M and Q visa holders.

S.E.C.A. Tax

- Imposed only on self-employed persons who are U.S. citizens or resident aliens for U.S. income tax purposes.
- B, E, H, L, O and P visa holders are frequently subject to S.E.C.A. tax if they satisfy the Substantial Presence Test (see the Income Tax section).

Totalization Agreements

As of January 1, 2009, international agreements on social security have been entered into between the U.S. and Austria, Australia, Belgium, Canada, Chile, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Korea, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom.

These agreements attempt to eliminate double social security tax if the tax is compulsory in the U.S. and the foreign jurisdiction. In addition, the agreements provide for a “totalization” of benefits if the taxpayer has accumulated periods of coverage in both systems, but not enough coverage in either system.

January 1, 2009 the United States is under negotiations with or has pending agreements with Mexico and Poland.

In general, the agreements provide that:

- Employees pay social security tax only to the country in which the work is performed. However, if the employee expects to work in such country for less than five years and continues to work for the home country employer, he generally pays tax only to the home country.

Social Security Numbers

Social security numbers are required of all employees for withholding of taxes. They are also useful for opening a bank account and other identification purposes.

Generally, non-citizens must first have permission to work from the Department of Homeland Security (DHS) before applying for a Social Security number.

To apply for a Social Security number, an individual should bring the following to the local Social Security Administration (SSA) office: A completed Form SS-5, Application for a Social Security card, and documentation proving (1) immigration status, (2) work eligibility, (3) age, and (4) identity.

Immigration status must be proved by presenting an I-94, Arrival/Departure Record issued upon arrival in the United States. Holders of F-1 or M-1 student visas must also produce I-20, Certificate of Eligibility for Non-immigrant Student Status. J-1 and J-2 exchange visitors must produce DS-2019, Certificate of Eligibility for Exchange Visitor Status.

Documents proving identity must be current (not expired) and show the applicant's name, identifying information and preferably a recent photograph. All documents must be either originals or copies certified by the issuing agency. Although certain documents can be used to prove more than one requirement, at least two original, non-expired documents are required to apply for a Social Security Number.

Upon verification of the documents presented to DHS the SSA will mail the Social Security Card. In the interim the SSA provides a letter to the employer stating that a social security number has been applied for.

The impact of the U.S. estate tax and state property laws on family finances make estate planning an important concern of persons transferring to the U.S.

The combined U.S. Estate and Gift Tax may be imposed on gifts and inheritances.

- For domiciliaries, the estate tax based on the value of worldwide assets. Nondomiciliaries are taxed only on assets in the U.S.
- Both taxes are based on the value of assets transferred.
- Federal tax rates range from 18% to 45%.
- The effective tax rate can be higher if the state of residence has its own estate or inheritance tax.
- Various tax treaties may also significantly impact the federal estate tax.

Domicile

The first question is whether the person moving to the U.S. will be changing domicile.

- U.S. domicile is acquired by living in the U.S., with no definite present intent to leave. Residence without the intent to remain indefinitely is not domicile.
- Factors showing intent include the location of the family, permanent home and other assets; visa status and duration; and where the person votes, files tax returns and belongs to clubs, churches and other organizations.
- An estate tax treaty with the country of original domicile may provide rules for determining domicile, even if a person is deemed to be domiciled in both countries.
- Employment contracts, legal documents such as wills and trusts and the way one's assets are positioned can also indicate intent.

Financial Disclosure

- Domicile in the U.S. results in disclosure and tax on worldwide assets.
- Nondomiciliaries wishing to deduct expenses allocable (in whole or in part) to U.S. property must disclose worldwide assets.

Taxable Transfers

Estate tax is based on the value of all assets owned or controlled by the decedent at death, including:

- assets held in the decedent's name.
- assets the decedent owned with someone else (such as property held in joint name with a child).
- assets passing to others through a beneficiary designation (such as life insurance and pension plans).

Assets held in joint name with someone other than a spouse who is a U.S. citizen are presumed to be owned entirely by the decedent unless separate contributions toward the purchase are shown.

Tax Thresholds

- Estates of U.S. domiciliaries valued at $3,500,000 (this amount may change after 2009) or less are not subject to federal estate tax.
- The threshold for state estate tax can be much lower (New York is $1,000,000).
- Estates of non-U.S. domiciliaries are taxed only on property in the U.S., generally with a $60,000.00 threshold.

These thresholds can be changed through legislation and current tax advice should always be sought.

U.S. Persons receiving gifts or inheritances from former longterm U.S. residents or citizens who surrendered their permanent resident visa or citizenship must pay tax on the value of the gift or inheritance at the maximum gift or estate tax rate.

Marital Transfers

The portion of an estate that is taxed may be reduced through the "marital deduction", by transferring property to a surviving spouse.

- Since 1981, the U.S. has allowed unlimited wealth to be transferred to a surviving spouse without tax.
- If the surviving spouse is not a U.S. citizen, generally no marital deduction is allowed (see the discussion of naturalization in the Immigration section).
- An exception to the rule denying the marital deduction for a non-U.S. citizen spouse allows the marital deduction for assets transferred to a Qualified Domestic Trust (QDT).
- The QDT must have a U.S. trustee. Trust assets will be subject to U.S. estate tax when the surviving spouse dies or capital is distributed from the trust. There are also specific rules regarding the assets held by a QDT.

Lifetime Transfers

An alternative to the QDT for U.S. domiciliaries is to transfer assets to the spouse prior to death.

- Gift tax rules apply to lifetime transfers of worldwide property after U.S. domicile is established.
- Domiciliaries can transfer tax-free unlimited amounts to spouses who are U.S. citizens. As of 2009, only

$133,000.00 (increased periodically by COLA) per year may be transferred to a non-U.S. citizen spouse, free of U.S. gift tax.

- If spouses enter the U.S. with their assets divided, U.S. gift tax rules do not apply.

Reporting Foreign Financial Accounts

- The IRS is aggressively pursuing U.S. citizens and residents who do not report their overseas financial accounts.
- As long as the aggregate value of all the foreign accounts is valued at no more than $10,000, no reporting is required.

Reporting Certain Foreign Gifts

- U.S. residents must report gifts or inheritances of more than $100,000 (not adjusted for inflation) from a nonresident or a foreign estate. The threshold for reporting gifts from foreign corporations and partnerships is lower.

Tax Procedure

The estate tax return must be filed, with payment of tax, nine months after death.

- Estate administration usually continues until the I.R.S. audits the estate tax return.
- The audit may take six to nine months after the return is filed.