Employment Tax Consequences of An International Workforce – Moving Employees Into And Out of the US.

I. Global Mobility – Employees  (also see Rev. Rul. 92-106) (Debbie Spyker)

A. Outbound US Citizens and US Resident Aliens (Green Card Holders)
   i. Worldwide wage reporting
      1. Allowances often paid by host country
      2. Split pay delivery in home and host country
      1. IRC Sec. 3401(a)(8)(A)(i): Section 911 Earned Income Exclusion and Form 673
      2. IRC Sec. 3401(a)(8)(A)(ii): Foreign Sourced Wages subject to mandatory foreign income tax withholding
         a. CCA 200814010- Voluntary WH can’t be implemented to avoid US income tax withholding.
      3. Hypothetical Tax Withheld versus Actual Tax Withheld
   iii. Social Security Totalization Agreements
      1. US Citizens/GCH employed by American employer and sent on short term assignment (lasting 5 years or less) generally remain subject to US FICA (collectively social security and Medicare).
         a. American employer applies for Certificate of Coverage with US Social Security Administration
      2. Does not apply to federal or state unemployment insurance tax.
         b. US citizen, but not GCH, is subject to US FUTA and US SUTA when sent by American employer to work outside of US.
   iv. Compliance Challenges
      1. Shadow payroll reporting in foreign jurisdiction
      2. Capturing global wages for US wage reporting and withholding, particularly allowances and noncash benefits paid by foreign host employer;
      3. Secondment agreements to “lend” US citizen/GCH to foreign employer to mitigate corporate PE risk;
      4. Wage withholding, reporting, gross-ups of foreign income and social taxes (for non Totalization countries);
      5. Work permits and immigration issues for foreign jurisdiction
      6. Continued coverage under US benefit plans;
      7. Tracking and reporting multi-year compensation for US versus foreign purposes (timing issues);
      8. Tax Equalization or Tax Protection Policy

B. Inbound Foreign Nationals – Business Visitors
   i. Short term business visitor into US (B-1 or Visa Waiver)
      1. Business visitors not eligible for US Social Security Number (SSN)
      2. Statutory income tax exemption under IRC Sec. 861(a)(3) if less than $3,000, less than 90 days in US, and foreign employer.
3. Definition of “work” for immigration purposes different that definition of “work” for US income and FICA taxation (wage reporting and withholding)

ii. Income Tax Treaty exemption process
   1. Foreign national should provide Form 8233 and US TIN required to claim income tax treaty exemption (typically dependent personal services article but may be student or researcher article)
      a. Submission of Form 8233 employer to IRS for review
      b. Foreign national typically does not have ITIN and therefore foreign employer has exposure for failure to withhold FITW
      c. Many states do not recognize the income tax treaty and therefore, there often is a state wage withholding/W-2 filing requirement even if the federal income tax treaty applies.
         i. Dual reporting on Form 1042-S for treaty exempt or wages versus Form W-2 for FICA tax reporting or state wage reporting

iii. Wages subject to US Federal Income Taxation
   1. Foreign national from non treaty country
   2. Foreign national has not executed Form 8233/W-7
   3. State income taxation/withholding in states that do not recognize the income tax treaty

iv. Social Security Totalization Agreements
   1. Generally FICA tax exempt if foreign national is from Totalization Country but not exempt if from non Totalization country such as India / China.
      a. Certificates of Coverage (“COC”) from foreign national’s home country
   2. Totalization Agreements do not cover FUTA and SUTA so any US services by foreign national are generally subject to FUTA/SUTA (no deminimis threshold)

v. Foreign Corporate Directors
   1. Foreign nationals generally enter US as business visitors when coming to the US to perform director duties
   2. Income tax Treaties typically have separate Director article
      a. Some treaty countries tax Director fees based on location of corporation, others tax Director fees based on where Director physically performs services.
      b. 30% withholding and Form 1042-S generally required
         i. Canada Treaty – 5th Protocol –
            1. Form 8233/TIN to claim exemption
      c. Track physical presence for purposes of both fees and multi-year compensation (equity)
vi. US Compliance Challenges – Business Visitor Employees
   1. If there is no SSN, payroll providers will not process wages in payroll for foreign nationals who have US taxable wages
   2. Foreign employer does not have EIN and/or not set up to perform US wage reporting and withholding
      a. Form 2678 Authorized Agent election to appoint US affiliate as Agent to perform required US reporting
         i. Agent Election not recognized for FUTA or SUTA and some state Departments of Revenue do not permit agent reporting for state income tax withholding
   3. ERP systems may not permit use of “dummy SSN”
   4. Difficult to remit tax deposits manually if payroll automated or Company utilizes third party provider

vii. Issues with treatment of foreign national Performing Services in US as Independent Contractor
   1. Foreign nationals entering US as business visitors / visa waiver generally should not receive remuneration for service from US employer for services within the US (but can receive expense reimbursement)
   2. Legal/immigration issues with employment of unauthorized worker in US
      a. I-9 Regulations convert a worker to an employee by operation of law if employer had “constructive knowledge” that worker was not eligible to work in the US.
   3. Lack of documentation of foreign status and lack of SSN/TIN may expose US payor to income tax withholding (IRC Sec. 1441, IRC sec. 3401, or backup WH).
      a. Forms 1099-MISC
         i. Only issued to US persons
            1. An ITIN (9XX-7X-XXXX or 9XX-8X-XXXX) should trigger questions prior to payment and question from payor as to whether 30% withholding should be performed (or whether payment should be processed in payroll and subjected to FITW, SITW, FICA, FUTA, and SUTA regardless of immigration status)
      b. Form 1042-S
         i. Report payments of US sourced income to foreign persons.
4. Services by foreign national outside of US are not US sourced and not subject to reporting and withholding but generally need documentation of foreign status.
   a. Presumption under Reg. Section 1.1441-1(b)(3)(iii)(E) reiterates paragraph E of Notice 2001-4, and provides that a payment for services is presumed to be made to a foreign person, if
      i. the payee is an individual,
      ii. the withholding agent does not know, or have reason to know, that the payee is a US citizen or resident,
      iii. the withholding agent does not know, or have reason to know, that the income is (or may be) effectively connected with the conduct of a trade or business within the US, and
      iv. All of the services for which the payment is made were performed by the payee outside the US.

5. Compliance issues in foreign country when employing foreign nationals as independent contractors
   a. Does US Company create permanent establishment risk by employing foreign national in foreign jurisdiction?
   b. Does US Company have foreign wage reporting or withholding obligations?
   c. Does US company have exposure for other taxes, corporate tax, VAT, GST, etc.?

C. Short term assignment with authorized to work in US –
   i. Immigration Issues
      1. Visa status is a legal immigration issue
         a. Examples of Visas permitting employment authorization in US include L-1, H1B, E1, TN, J-1, F-1,
      2. Social Security Number
         a. Foreign nationals present in US on immigration visa that permits work authorization are generally eligible for SSN
         b. Generally must apply at SSA in person
         c. Difficulty in obtaining SSN for short term rotators if they do not apply for SSN while physically present in the US.
         d. Time lag between date of entry when USBCIS makes immigration data available to SSA
      3. Generally must implement US shadow payroll to administer required US wage reporting and withholding
a. Wages often paid to inbound foreign national from home country (e.g., no cash paid from US)
   i. Source of payment is irrelevant. Often workers are paid from home country
b. Foreign pension plans are not US qualified plans and employee or employer contributions are often subject to US tax (all remuneration for services is wages unless exempted under IRC)

4. US entity is typically the visa sponsor and “the employer” that is required to report for US wage reporting purposes
   a. Dependent Personal Services Article typically does not apply because the sponsor of the nonimmigrant visa permitting US employment is sponsored by the US entity
   i. Companies often presume that as long as foreign national present in the US less than 183 days there is no reporting and no withholding required.
      1. US sourced compensation reportable on Form 1042-S
      2. Dependent personal services article generally not met if US company sponsors the employment related visa petition

II. Immigration Issues – Cross Border - Linda Dodd Major

1. Confusing terms and concepts
   a. Immigrant (actual or intending)
   b. Resident (different for immigration and tax purposes)
   c. Visa
   d. US Person
   e. “Sponsor”
   f. “Business”
   g. Employer-specific
      i. Refers to employment authorization restricted to “sponsor” – may be any of the following
         1. Job-specific (e.g. A, H-1/2, L-1, E-1/2, G, R,TN, etc)
         2. Contract-specific (e.g. TN, O)
         3. Program-specific (e.g. F-1, J-1, Q)
         4. Itinerary-specific (e.g. O or P performers/athletes)
   h. Payment
      i. Payment is not an immigration issue, but rather generally serves as proof that services were accepted by payer
      ii. Refusal of payment does not cure immigration violations

2. US Immigration Law
   a. Jurisdiction limited to activities inside the United States
   b. Administered by DHS, formerly DOJ/INS
   c. Classes of foreign born persons
i. Naturalized citizens
ii. Immigrants (aka Lawful Permanent Residents)
iii. Nonimmigrants (lawful temporary aliens, subject to restrictions upon status)
iv. Migrants

3. US Visa law
   a. Administered by DOS/consular service
   b. IMPORTANT DISTINCTION: visa versus immigration status
   c. Visa irrelevant following admission to the US and issuance of Form I-94

4. Important documents
   a. Immigration-related (red flags for tax compliance purposes)
      i. Visa
      ii. Form I-94
      iii. Form I-551 (aka Permanent Resident Card or “Green Card”)
      iv. Employment Authorization Document (aka “work permit”)
      v. Form I-797 Notice of Action (aka “approval notice” or receipt)
      vi. Form I-20 (F-1) or DS-2019 (J-1)
   b. Tax-related (red flags for immigration compliance purposes)
      i. Form W-9 and W-8BEN (relating to “work”)
      ii. Form W-7
      iii. Form W-2
      iv. Form 8233
   c. Actual versus deemed or constructive knowledge
   d. Immigration audits routinely request tax records and vice versa (increasing cooperation as info uncovered by one agency is referred to other agency as predication for enforcement)

5. Work in the United States
   a. Distinction from “services” under tax law
   b. Job classification is important for immigration, tax, and employment law purposes
   c. “Work” under immigration law
      i. 3-part test (non-regulatory)
      ii. Matter of Hira
   d. Work authorization of aliens
      i. Permanent, unrestricted (*)
      ii. Temporary, unrestricted (*)
      iii. Temporary, restricted
      iv. Unauthorized
         (*) authorized for self-employment
   e. Form I-9
      i. Required of all employers since IRCA was enacted in 1986
      ii. Independent contractors do not complete Form I-9, but are covered under 8 CFR 274a.5
      iii. Information collected may be very relevant for tax purposes (and vice versa)
   f. Evidence of employment authorization
i. Unrestricted SSN card
ii. “Green card”
iii. Form I-94 (typically for employment-specific aliens only that should be recognizable by their “sponsors”)

6. Business visitors
a. VISITOR is the operative distinction in this term
b. Restricted to business-related and tourist activities under classification at 8 CFR 214.2(b)
   i. US “work” is prohibited
      1. Honorarium exception is available only to higher Education and nonprofit/govt research institutions
c. B-1/B-2 visa permits holder to apply for admission under business visitor or pleasure visitor classification
d. All visa waiver travelers are VISITORS and their activities are restricted accordingly
e. Most visa waiver travelers now precleared through ESTA
f. ESTA visitors are no longer issued distinctive green I-94W forms, but rather get passport stamps that may or may not be adequately endorsed for purposes that are important to payers
g. Payments to visitors (or restricted nonimmigrants) for US services (or expenses if accountable plan does not apply) create tax trail that will show up on tax returns if and when they apply for subsequent US immigration benefits (and potentially disqualify them)

7. Taxpayer Identification Numbers (TINs) of individuals
   a. SSNs
      i. Available only to nonimmigrants with current work authorization
      ii. Cards are annotated to reflect limitations upon work authorization
         1. Temporary: Valid only with DHS Authorization
         2. Unauthorized: Not Valid for Employment (once common, now rare)
      iii. Application is not possible until 10 days after admission
         1. Documentation must be validated via DHS' SAVE system
         2. Short-term workers cannot meet issuance standards, causing substantial tax compliance problems for payers
   b. ITINs
      i. Available only to aliens without current work authorization
      ii. Submission of an ITIN in the context of compensation for US services is a serious red flag
      iii. W-7 and 8233 both contain significant immigration status details
         A. that payers should recognize

III. Current Environment and Trends (Dave Horton)
A. IRS Enforcement/Compliance Trends
   i. Outer Continental Shelf (OCS) Initiative for Foreign Vessels operating in US Waters
ii. Recent IRS International Employment Training by LB&I Employment Tax Group
iii. IRS Voluntary Disclosures
iv. Other