



Lesson 8

Hiring people who live in the U.S. who aren't citizens

David Higgins
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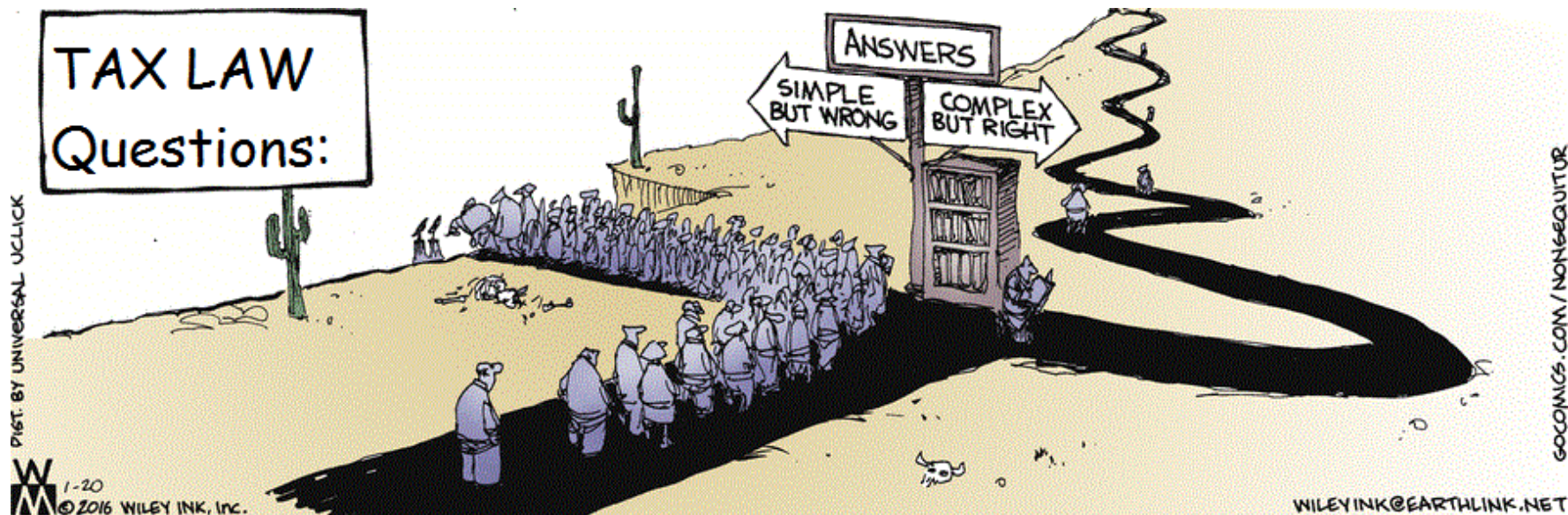


Your Presenter

- **David Higgins**
- Tax Specialist
- 14 years working for the IRS
- Currently in Communications and Liaison
- Previously:
- Collections Representative
- Revenue Officer



Tax Questions: Please ask in the Chat





Disclaimer

- This class provides an overview of certain provisions for general informational purposes only and **is not itself tax guidance**.
- The content in this presentation is based on tax guidance on [IRS.gov](https://www.irs.gov).
- This deck relies on simplifications and generalizations to convey high-level points about tax provisions. Please **refer to guidance** issued by the IRS for detailed information on the rules associated.



Overview

- Verify employee's identity and status
- Withhold taxes at the proper rate
- Deposit and pay taxes properly
- File accurate and timely withholding tax returns
- Two helpful IRS publications:
 - Publication 519, *U.S. Tax Guide For Aliens, and IRS*
 - Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*



Determine Worker's Tax Status

- The first step is to determine that worker's tax status
- Worker Status
 - U.S. citizen
 - U.S. resident alien
 - Nonresident alien



Individual Tax Identification Number (ITIN)

- A U.S. citizen's tax identification number is that person's Social Security Number or SSN
- A foreign individual may have an ITIN
- ITINs look a lot like Social Security numbers
 - Nine digit numbers – begin with the number nine
 - Have a range of 70 to 88, 90 to 92, and 94 to 99 in the fourth and fifth digit
 - Example: 9 00 88 0000
- IRS issues ITINs to those not eligible for a SSN
- Issued regardless of immigration status
- Not a work permit



Work Eligibility

- Complete Form I-9, Employment Eligibility Verification
- To determine eligibility:
 - Use e-verify system on the U.S. Citizenship and Immigration Services web site at **USCIS.gov**, or at **E-VERIFY.gov**
- It is illegal to knowingly employ someone who is not authorized to work in the U.S
- If employ illegal aliens, same payment rules apply
- If you hire someone a non-U.S. citizen eligible to work in the U.S., first determine if they're a resident or nonresident alien



Resident Alien – Green Card

- Has a "green card" OR has met the Substantial Presence Test
- U.S. Green card
 - USCIS Form I-551, Permanent Resident Card
 - Right to reside permanently in the U.S.
 - Can work without restrictions
 - Lawful permanent resident
- Lawful permanent residents waiting for green cards have an I-551 stamp on their foreign passport



Resident Alien – Substantial Presence Test

- Substantial presence test to claim resident alien status without a green card
- In the U.S. for 31 days during the current year and 183 days during the 3-year period
- Meets the 183 day test – if sum of the following is at least 183 days
 1. Number of days in the United States during the current year; **PLUS**
 2. 1/3rd the number of days in the U.S. during the preceding year; **PLUS**
 3. 1/6th the number of days in the U.S. during the second preceding year **EQUALS** at least 183 days



Resident Alien – Substantial Presence Test – Example

- Physically present in the United States for 150 days in each of the years 2020, 2021, and 2022
 1. 150 days in 2022 = 150 days, **PLUS**
 2. 150 days in 2021 = 50 (1/3 of 150), **PLUS**
 3. 150 days in 2020 = 25 (1/6 of 150)

225 days (150 + 50 + 25)
- Meets the 183 day test: 183 is less than 225
- Resident alien under the Substantial Presence Test for 2022



Resident Alien – Rules about counting days

- Do not count days when someone is in the U.S. as a teacher or trainee under valid J or Q Visa
- Publication 519, *Tax Guide For Aliens*, has a complete list of the exceptions
- Call the IRS Business And Specialty Tax toll free line at 1-800-829-4933



Resident Alien – Summary

- Potential employee has:
 - Green card **OR**
 - I-551 stamp **OR**
 - Passes the Substantial Presence Test
- Treat them like a U.S. citizen for income tax, Social Security and Medicare tax withholding
- Include them when paying your Federal Unemployment Tax Act (FUTA) tax
- IRS.gov, and enter “**green card test**” or “**Substantial Presence Test**” in the search box
- IRS Publication 519, *Tax Guide for Aliens*



Nonresident Aliens

- Someone who is not a U.S. citizen or a resident alien
- All nonresident aliens are not treated the same for tax purposes
- Form W-4, Employee's Withholding Certificate, is required
 - Completed according special instructions in Notice 1392, *Supplemental Form W-4 Instructions for Nonresident Aliens*



Nonresident Aliens – Calculating withholding

- Nonresident aliens cannot file returns using the standard deduction (unless the nonresident is a student or business apprentice from India)
- Adjustment before using the general withholding tables in IRS Publication 15, *Employer's Tax Guide*
- There are two steps required for calculating how much income tax to withhold from the wages of nonresident alien employees



Nonresident Aliens – Calculating withholding (cont. 1)

- Step 1: Use IRS Publication 15-T
 - There are two tables of amounts to add to your nonresident alien employees wages
 - Table 1 pertains to NRA employees first paid wages before 2020 and which have not submitted a Form W-4 for 2020 or later
 - Table 2 pertains to NRA employees who have submitted a Form W-4 for 2020 or later, or were first paid wages in 2020 or later
- Step 2:
 - Enter the amount figured in step 1, as the total taxable wages on the withholding worksheet



Nonresident Aliens – Calculating withholding (cont. 2)

- Add the amounts from tables 1 and 2 to wages solely for calculating income tax withholding
- Do not include these amounts on their W-2
- Purpose of adjustment is to figure withholding from wages of nonresident alien employees
- Only applies to nonresident alien employees who have wages subject to income withholding



NRA Exceptions to General Rules for Withholding

- Nonresident alien may be a resident of a country that has a tax treaty with the United States
- Tax treaty may provide for lower tax rates or exemption from withholding
- Employee uses Form 8233 instead of Form W-4 to claim a tax treaty exemption from withholding
- Employer must report wages exempt under a tax treaty paid to a NRA on Form 1042 and 1042-S
- Additional wages paid to a NRA over the exempt amount should be reported on Form W-2



Exceptions to General Rules for Withholding (cont. 1)

- Wages exempt from withholding if all three of the following conditions are met:
 1. If nonresident alien is present in the U.S. for a total not exceeding 90 days in a taxable year
 2. Compensation does not exceed \$3000
 3. Performs services as an employee usually for certain foreign based entities



Exceptions to General Rules for Withholding (cont. 2)

- Two conditions are met per the tax code:
 1. Nonresident alien is in F, J, M, or Q, nonimmigrant status
 2. Compensation paid by nonresident alien individual, foreign corporation or partnership, or certain U.S. foreign offices
- Nonresident aliens who don't file or file an invalid Form W-4, will have tax withheld as if single status, zero exemptions



Exceptions to General Rules for Withholding (cont. 3)

- Nonresident alien employees who receive wages must follow special rules in Notice 1392 when completing Form W-4
- Nonresident alien claiming tax treaty benefits
 - Must use Form 8233 instead of Form W-4 and
 - Must make adjustment to nonresident alien employee's wages before using the withholding tables



Employment Taxes – Nonresident Aliens

- Generally subject to SS, Medicare, and FUTA taxes
- Wages not exempt by a tax treaty are usually subject to Social Security and Medicare taxes
- Exception for Totalization Agreements between the SSA and various foreign countries
 - Designed to correct dual Social Security taxation for nonresident employee working in U.S.
 - Nonresident worker must provide employer with:
 - Certificate of coverage from foreign country **or** SSA statement that their wages are not subject to U.S. Social Security Taxes
 - Must keep copy of certificate for your records



Nonresident alien (NRA) Independent Contractors

- Independent Personal Services is a tax treaty term and it refers to work performed by a nonresident alien independent contractor
 - Payments for professional services, such as attorney, physician, or accountant fees
 - Might withhold taxes on payments to nonresident aliens, even though they are not your employees
 - Withholding provision very different from U.S. citizens or resident alien independent contractors



Nonresident alien independent contractors (cont. 1)

- Withhold 30% unless they have Withholding Agreement with the IRS
 - Must provide IRS letter that final payment amount (up to \$5,000) is exempt from withholding) **or**
 - Form 8233 to claim tax treaty exemption
- Special rules if you yourself are a nonresident alien
- Need more information – call the IRS Business and Specialty Tax Line at 1-800-829-4933 **or** ask your tax professional



Nonresident alien independent contractors (cont. 2)

- Must withhold 30% of what you pay them
- Unless they provide an IRS approved withholding agreement or Form W-8 for reduced withholding
- Use Form 8233 to claim tax treaty benefits – not Form W-4
- Once you're done calculating withholding, it's time to deposit or pay the tax withheld
- Nonresident aliens tax deposit/withholding are the same as for U.S. citizens or resident aliens



Nonresident alien independent contractors (cont. 3)

- For more information:
 - IRS Publication 15, Employer's Tax Guide en **[IRS.gov/pub15](https://www.irs.gov/pub15)**
 - Small Business and Self-employed Tax Center at **[IRS.gov/smallbiz](https://www.irs.gov/smallbiz)** – Filing/Paying Taxes Section



Filing employment tax returns

- Provide a Form W-2 to:
 - Resident alien employees and
 - Nonresident alien employees who did not use Form 8233 to claim tax treaty benefits
- Include them on employment tax returns
 - Form 941, *Employer's Quarterly Federal Tax Return*



Filing employment tax returns (cont. 1)

- Form 8233 Procedures:
 - Review Form 8233, if correct, certify in Part IV
 - Mail one copy to IRS within 5 days after you receive it
 - Give one copy to the nonresident alien
 - Keep one copy for your records
 - Instructions for Form 8233 for mailing address
- IRS objects to claim for exemption from withholding
 - Must immediately begin withholding
 - Obtain a new Form 8233 every year, as long as you pay this person to work for you



Filing employment tax returns (cont. 2)

- Form 8233 filers have new employment tax return filing requirements with the IRS
 - Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*
 - Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*
 - Form 1042-T, *Annual Summary and Transmittal of Forms 1042-S*
- For nonresident alien employees who claimed tax treaty benefits and independent contractors
- Must file Forms 1042 and 1042-S with the IRS by March 15 of year following the work



Filing employment tax returns (cont. 3)

- File a separate Form 1042-S for each person and each type of income you paid that person
- Must also issue a Form W-2 for any amounts that are not covered by a treaty exemption
- If you live in a state/locality that taxes this income and may require withholding, file a Form W-2 with them – taxing authorities do not take Form 1042-S
- Give a copy of the Form 1042-S and any Form W-2 you filed to each nonresident alien employee who claimed tax treaty benefits and provided independent personal services whether you withheld taxes or not



Filing employment tax returns (cont. 4)

- Filed Forms 1042-S on paper to the IRS must include a Form 1042-T
- Must file Form 1042-S for even one person, then must also file an annual return on Form 1042
- No need to give a copy of Form 1042, but do need to keep a copy for your records.



Review

- Penalties for not meeting withholding requirements
- Treat employees and independent contractors who are **resident aliens** the same as U.S. citizens
- Nonresident alien employee who are not claiming tax treaty benefits
 - Use Form W-4, following the instructions in Notice 1392 and Publication 515
 - Include NRA employees on Form 941
 - Give IRS and localities a Form W-2



Review (cont. 1)

- For nonresident alien employees who are claiming tax treaty benefits
 - Use Form 8233 instead of Form W-4 and withhold according to the treaty
 - File Form 1042 with the IRS – Include the nonresident alien employees on the Form 1042
 - Give the nonresident alien employee and the IRS a Form 1042-S
 - Give the nonresident alien employee and any localities taxing them a Form W-2



Review (cont. 2)

- For nonresident alien (NRA) independent contractors who are not claiming tax treaty benefits
 - Use Form 8233 instead of Form W-4
 - Withhold 30%
 - Include withholding amount on Form 1042
 - File Form 1042 with the IRS
 - Give NRA contractors and IRS a Form 1042-S
 - Give NRA contractors and any localities taxing them a W-2



Review (cont. 3)

- For NRA contractors claiming tax treaty benefits
- For nonresident alien independent contractors who are claiming tax treaty benefits
 - Withhold 30%
 - Include them on the Form 1042
 - File Form 1042 with the IRS
 - Give NRA contractors and the IRS a Form 1042-S
 - Give NRA contractors and any localities taxing them a Form W-2



Review (cont. 4)

- Information on IRS.gov:
 - Publication 15, *(Circular E), Employer's Tax Guide*
 - Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*
 - Publication 519, *U.S. Tax Guide for Aliens*
- Information available at the U.S. Citizenship and Immigration Services website at **USCIS.gov**



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