

Can Foreign Nationals Work Remotely in the U.S.?



Immigration Blog

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While people have wanted to and sometimes enjoyed the opportunity to work while they are spending time outside of their home country, this practice became much more prevalent and common since the COVID-19 pandemic. With remote work far more normalized in the pandemic's wake, it is now easier and sometimes necessary to work from wherever you are — regardless of physical boundaries or limitations.

During the COVID-19 pandemic, most businesses had to figure out how their employees could work outside of the office setting. While many people worked from their homes, some workers wanted to travel to other places in the world and continue to work from there while enjoying a different setting. There are some important things for employees (and their employers) to consider when working from a location outside of their home country.

It is important to understand that this topic may be one of degree. When foreign national parents bring their children to Disney World, after a full day of walking and rides and heat, they return to the hotel and put their sweet treasures to bed. And what do they do next? Turn on the TV to relax? Maybe some, but many others will get out their phones and laptops to see what they missed all day from their offices. They may answer messages, make phone calls, review documents, etc. Are they working? Technically, yes — these are all work-related activities. So,

the question becomes: Are they violating their B-2 Visitor for Pleasure status? No, in fact, they are not. They are visiting the U.S. for the purpose of vacation, and incidentally doing some work. Those who come to the U.S., however, to spend every weekday working for their foreign employer, and weekends and evenings enjoying their new locations, can be seen to be working in the U.S.

When individuals apply for admission to the U.S. as B-1 Business Visitors, there are a few tests that U.S. Customs and Border Protection (CBP) officers may use to determine whether someone qualifies for B-1 status. They may consider whether the beneficiary of the activities is a U.S. company. They may consider whether the activities are having an impact on the U.S. labour market. And they may consider whether the activities are those for which individuals normally get paid. This last and commonly used criterion for determining admissibility as a visitor is the one where a Business Visitor may run into problems in trying to gain admission to the U.S.

Despite these tests, visitors are often not asked the relevant questions, and therefore are admitted as visitors.

The obligations that can stem from working remotely in the U.S. are twofold. For the employees, if they are generating income based on work activities that are being done in the U.S., they may have personal tax filing obligations, and possibly even tax liabilities in the U.S. There also can be tax and legal consequences for foreign (non-U.S.) employers who permit their employees to work remotely while in the U.S. Foreign employees working in the U.S. — even as visitors — may trigger tax filing obligations or tax liabilities in the U.S. for their foreign employers, generated by the presence of a remote employee.

Foreign employers should understand that they might have obligations to withhold funds from the pay of these employees to be deposited with a U.S. government organization. These employers may also be subject to employment laws in the jurisdiction where their employees reside while in the U.S. (local, state and federal). It may also be that foreign employers develop “permanent establishments” as defined by the U.S. Internal Revenue Code and U.S. income tax treaties (including Part 9 of Article 5 of the *U.S.-Canada Income Tax Treaty*), by virtue of employees living in the U.S., carrying along with them corporate, tax liability and litigation concerns.

While on a practical level, it does not appear that the U.S. Internal Revenue Service (IRS) has developed a level of technological sophistication sufficient to track or impose liabilities on foreign businesses in this situation universally, it is likely only a matter of time before they do. Likewise, the risk remains in place for both the employees working remotely and their employers — and the IRS is unlikely to warn businesses or remote workers before implementing a system of consequences for violations. That said, the main risk, right now, remains to the employees themselves, who may be told at any time by a CBP admissions officer that their activities (past and/or intended) while in the U.S. have violated/would violate their actual or intended status. Other agencies, such as Immigration and Customs Enforcement, could also determine that violations have occurred, if, for example, a foreign national is picked up in an unrelated immigration audit or due to a violation (such as speeding) or criminal act while in the U.S.

As a result of all of these concerns, employers and employees need to be aware of the location from which work is being done, and the potential legal impacts that can have on both the employer and the employee. It is important, however, not to let this awareness result in fraud when requesting entry. More than a few immigration clients have admitted to lying to border officers about the intended primary purpose of their trips into the U.S., to avoid any potential issues. If an officer has reason to believe that you are lying or lied previously about working in the U.S. or anything else, you could become permanently inadmissible to the U.S.

While the risk of consequences from remote working in the U.S. as a foreign national remains low, this is absolutely not a risk worth taking. Be honest, direct and straightforward with CBP officers when responding to questions about your entry. Almost no one is being asked about remote work at the moment, and very few are having remote devices randomly searched when entering (less than 0.01 per cent of applicants for admission in 2024) — but keep in mind that searches of electronic devices are always a possibility. If an officer decides to search your device(s) and finds indications that you are working while in the U.S., the topic could come up.

If you have questions about the immigration or tax implications of working remotely in the U.S. as a foreign national, please reach out to Eileen M. Martin (emartin@lippes.com), Elizabeth M. Klarin (eklarin@lippes.com) or any of the other immigration professionals at Lippes Mathias LLP, who would be glad to speak with you about your concern and, if a solution is needed, proactively or reactively.

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