

Many non-US individuals spend considerable time in the US, sometimes for extended periods. These individuals typically monitor their physical presence in the US closely during the calendar year and limit their days present in the US to less than 120 per year. The stakes can be quite high: depending on the number of days present in the US during the prior two years and the current year, those individuals might be considered US income tax residents based on the “substantial presence test,” summarized below.

As a consequence of government travel restrictions – and global health concerns caused by COVID-19 – these individuals may not have been able to leave the US as originally planned. Their extended presence in the US raises significant concerns that they could exceed the maximum number of days they can remain in the US without becoming US income tax residents.

On April 21, 2020 the US Internal Revenue Service (IRS) issued Revenue Procedure 2020-20 to provide a limited exception for eligible non-US individuals to exclude a certain number of days from their presence in the US for purposes of the application of the substantial presence test. This relief is welcome news to these individuals and permits them to remain in the US for an additional period until conditions improve and it is safe to depart. Alternatively, the individual could return to the US later in the year without adverse US income tax consequences. Under the Rev. Proc., up to 60 days can be excluded from US presence. Importantly, the individual need not be diagnosed with COVID-19.

## Why Do Days Present in the US Matter?

An individual who is not a US citizen may be a US resident for US income tax purposes if the individual holds a permanent resident card (“green card”) or satisfies the substantial presence test. When an individual becomes a US income tax resident, their worldwide income is subject to US income taxation and accompanying reporting obligations. Conversely, generally only the US-sourced income of a US nonresident is subject to US income taxation.

A green card holder will not be adversely affected by COVID-19 travel restrictions. Individuals who monitor their presence in the US to avoid the substantial presence test could be adversely affected if they cannot leave the US as originally planned.

The substantial presence test is generally met by an individual who: (1) spent 31 days during the current year in the US and (2) spent 183 days in the US, counting all days in the current year and 1/3 of days from the prior year, and 1/6 of days from the second prior year. A detailed explanation of this test and its various exceptions is available in our analysis, [Traveling to the US? There Can Be Important Tax Consequences](#). An individual’s current-year day count could be increased due to COVID-19 travel restrictions, causing the 182-day testing threshold to be exceeded.

## COVID-19 Medical Condition Travel Exception

In Rev. Proc. 2020-20, the IRS noted the concerns of the non-US individuals who might become US income tax residents because of COVID-19 travel restrictions. The IRS favorably and broadly addresses these concerns and establishes a limited 2020 exception referred to as the “COVID-19 Medical Condition Travel Exception.” This special exception is modeled on the existing Medical Condition Exception, which excluded certain days present in the US for medical reasons.

The IRS defines COVID-19 travel restrictions, namely the “COVID-19 Emergency Travel Disruptions,” to include the following conditions:

- Individuals who become severely restricted in their movements, including by order of government authorities, whether or not they are infected with COVID-19
- Individuals who attempt to leave the US, but due to cancelled flights, transportation disruptions, shelter-in-place orders, quarantines or border closures have their departures delayed
- Individuals who do not feel safe traveling as a consequence of COVID-19 in light of the recommendations for social distancing and limitations on public exposure

A non-US individual is an “Eligible Individual” and so can assert the COVID-19 Medical Condition Exception if they: (1) were not a US resident at the close of the 2019 tax year; (2) are not a green card holder during 2020; (3) **are present in the US during one period up to a maximum of 60 consecutive days that starts on or after February 1, 2020 and on or before April 1, 2020, defined as the “COVID-19 Emergency Period”**; and (4) do not become a US resident in 2020 due to days of presence in the US not including the COVID-19 Emergency Period.

Under Rev. Proc. 2020-20, an Eligible Individual who is subject to one or more of the COVID-19 Emergency Travel Disruptions may exclude days present in the US during the individual’s COVID-19 Emergency Period. The maximum number of days that can be so excluded is 60. The following examples illustrate this special exemption (not taking any treaty provisions into account).

### Example 1

Jack, a non-US individual, usually spends 120 days per calendar year in the US. In 2020, he arrived on January 1 and planned to leave on February 29. Due to a COVID-19 Emergency Travel Disruption, Jack will leave the US on April 30. Jack plans on returning to the US later in the year for an additional 60 days. Based on the three-year formula for days present in the US during 2020, Jack will be present in the US for 240 days. He would normally be considered a US income tax resident, unless he can establish a closer connection to one or two other countries. Jack's COVID-19 Emergency Period is the maximum 60 days, February 1 – March 31. As a result, for purposes of the revised three-year formula, Jack will be present in the US for only 180 days. Consequently, he will not be a US income tax resident during 2020 and will not need to assert the closer connection exception.

### Example 2

Joe, also a non-US individual, traveled to the US this year and did not visit the US during 2018 or 2019. Joe arrived in the US on February 15 to escape the COVID-19 virus and plans to remain in the US until August 30. Joe will be present in the US for more than 182 days during 2020 and, absent the COVID-19 Virus Medical Condition Exception, would be considered a US income tax resident. Joe, however, could exclude a 60-day COVID-19 Emergency Period starting on February 15 until April 14 for a total of 138 days. Consequently, he will not be a US income tax resident during 2020.

### Example 3

Jill, also a non-US individual, usually spends 120 days per calendar year in the US. For 2020, she arrived on January 1 and planned to leave on February 29. Due to the COVID-19 Emergency Travel Disruption, she does not plan to leave the US until June 30. Jill plans to return to the US later in the year for an additional 60 days. She will be considered a US income tax resident because she will be present in the US for more than 182 days during the year. Jill's COVID-19 Emergency Period is 60 days, February 1 – March 31. For purposes of her revised 2020 day count, Jill will be present in the US for 182 days. Consequently, if Jill can establish a closer connection to one or more other countries, she will not be a US income tax resident during 2020.

## 2020 Income Tax Reporting

If Jack or Joe have US source income and file a 2020 US Nonresident Income Tax Return ([Form 1040-NR](#)) during the year, they will have to prepare and attach to their return [IRS Form 8843](#), Statement for Exempt Individuals and Individuals with a Medical Condition, which claims the COVID-19 Medical Condition Exception. If they do not have to file a US income tax return, they will not have to file Form 8843, but should retain all relevant records to support reliance on Rev. Proc. 2020-20 and, if requested by the IRS, will have to produce his records and complete Form 8843.

Jill will have to file [IRS Form 8840](#), Closer Connection Exception Statement for Aliens, which claims the application of the closer connection exception, and IRS Form 8843, which claims the COVID-19 Medical Condition Exception. If Jill has US source income, she may have to file a 2020 US Nonresident Income Tax Return and attach Forms 8840 and 8843 to her 2020 income tax return.

The other available exceptions for the substantial presence test – including the regular Medical Condition Exception, the US income tax treaty dual resident tie-break provision and student/trainee visa exceptions – are also available this year to the non-US individual who claims the COVID-19 Medical Condition Exception. The COVID-19 Medical Condition Exception will not be available to an individual who has applied for or otherwise taken steps to be a lawful permanent US resident during 2020.

## Dependent Personal Services Under US Tax Treaties

In addition, the COVID-19 Medical Condition Exception is also available to non-US individuals who claim US income tax treaty benefits for exclusion of dependent service income received in the US, provided the individual is present in the US for less than 183 days in any 12-month period. During 2020, an individual who would exceed the 182-day threshold because of COVID-19 Emergency Travel Disruptions, could exclude a COVID-19 Emergency Period for purposes of determining the individual's eligibility for this treaty benefit. In this case, [IRS Form 8233](#), Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien, should be completed and either given to the US withholding agent or the appropriate information should be submitted to the IRS with the 2020 income tax return.

The above discussion of the US income tax resident rules apply for federal income tax purposes. Many states have their own rules to determine if an individual is a resident of that state for state income tax purposes. Unless a state announces otherwise, the COVID-19 Medical Condition Exception may not apply for state income tax purposes.

If you have any questions about US income tax resident status during 2020, contact one of the lawyers listed or the firm lawyer with whom you usually work.

## Contacts

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