

Classifying Nonresident Alien Employees

As tax season slowly approaches, many employers may have questions about withholding taxes for foreign employees. With Michigan's large migrant worker population, Michigan employers must be aware that nonresident alien employees' withholdings differ from those of resident employees. The distinction between a nonresident alien employee and a resident employee is crucial: nonresident employees' taxes are withheld at a different rate than the taxes of resident employees. IRS Publication 515 details how to classify a nonresident employee.

A nonresident alien employee is an alien residing in the United States who does not have a green card, and (in general) spends less than 183 days a year in the United States. It is important to realize that an individual's designation as a nonresident or resident alien for tax purposes is separate from the designation applicable under immigration laws.

Generally, an employee's status is determined by the employer based on documentation provided by the employee. If no documentation is given, the employer should use the IRS "presumption rules" to make a determination of the employee's status. The presumption rules are extensive and beyond the scope of this article, but can be found at www.irs.gov. If an employee has not provided documentation and an employer does not follow the presumption rules, the employer may be liable for tax, penalties, and interest. IRS Publication 515 explains the presumption rules in detail and gives the relevant IRS regulation sections.

It is also important to consider whether the United States has an income tax treaty with the employee's country of residence. The United States has 64 treaties with foreign countries. Certain treaties provide specific rules for withholding. The text of these treaties can be found at www.irs.gov.

Because different withholding rates apply for nonresident alien employees, it is important that employees are correctly classified. Do yourself and your employees a favor and make the correct classification.

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