



In this issue:

Australia: Changes to visa legislation	1
Germany: Change to tax treatment of severance payments expected	3
Korea: 2017 income tax law revisions approved by National Assembly	5
United States: IRS launches new online tool allowing taxpayers to check basic account information	6

Australia: Changes to visa legislation

Temporary activity visa framework changes

As of 19 November 2016, the following Australian visa subclasses were closed to new applications:

- Subclass 401 Temporary Work (Long Stay Activity) visa;
- Subclass 402 Training and Research visa;
- Subclass 416 Special Program visa;
- Subclass 420 Temporary Work (Entertainment) visa; and
- Subclass 488 Superyacht Crew visa.

Additionally, four new Australian visa subclasses were introduced on 19 November 2016:

- Subclass 400 Temporary Work (Short Stay Specialist) visa;
- Subclass 403 Temporary Work (International Relations) visa;

- Subclass 407 Training visa; and
- Subclass 408 Temporary Activity visa.

Major changes of note include the following:

- As of 19 November 2016, all sponsorship, nomination, and visa applications for all temporary activity visas must be lodged online (with the exception of the Subclass 403 International Relations visa, which will also retain a paper visa lodgement option);
- There is now a single sponsorship visa – the temporary activities sponsorship visa – that replaces the former sponsorship types for the temporary activity visa subclasses, and it is valid for five years;
- Under the transitional arrangements, companies with valid long stay activity, training and research, professional development, entertainment, special program, or superyacht crew sponsorship visas can use their current approvals to sponsor Subclass 407 or Subclass 408 visa applicants until 17 May 2017; and
- After 17 May 2017, in order to continue sponsoring foreign workers under the temporary activity visa subclasses, all sponsors will need to obtain the new temporary activities sponsorship visas for such workers.

Subclass 407 (Training) visa: The new Subclass 407 Training visa retains much of the legislation contained within the previous Subclass 402 Training and Research visa. Some notable changes include:

- The research component has been removed; research now fits under the new Subclass 408 visa.
- A sponsor for this visa must now, in most cases, also be the foreign worker's employer, although there are limited circumstances in which there will be more than one employer.
- Occupational training is to be provided directly by the sponsor, and new restrictions have been placed on outsourcing occupational training to third parties. This change was introduced to prevent the Subclass 407 Training visa from being used by sponsors as a pretext to supply labor to a business.
- All primary applicants must now possess at least functional English proficiency.

Subclass 408 Temporary Activity visa: The Subclass 408 Temporary Activity visa includes all four streams of the previous Subclass 401 Temporary Work (Long Stay Activity) visa, as well as visa participants who fell within the former visa subclass groups:

- Invited participant stream of the Subclass 400 Temporary Work (Short Stay Activity) visa;
- Subclass 420 Entertainment visa;
- Subclass 488 Superyacht Crew visa; and
- Research component of the Subclass 402 Training and Research visa.

Unlike the Subclass 401 visa, the Subclass 408 Temporary Activity visa will no longer require an accompanying nomination application. As a result, the nomination requirements have been incorporated into the visa application.

In certain circumstances, a Subclass 408 visa applicant may not need to be sponsored. This will occur when the applicant's intended period of stay is three months or less, and the applicant is outside of Australia. In all other circumstances, the applicant must be sponsored.

Subclass 400 Temporary Work (Short Stay Specialist) visa: The key change to the Subclass 400 Temporary Work (Short Stay Specialist) visa is the introduction of online lodgements for all applications. Please also note:

- The name of the Subclass 400 visa has been changed from "Short Stay Activity" to "Short Stay Specialist," which accurately reflects the true intent of this visa category; and
- Removal of the invited participant stream, which is now incorporated into the Subclass 408 visa.

Other changes effective November 19 2016

Member of the Family Unit: As of 19 November 2016, the definition of "Member of the Family Unit" has been amended. The impact of this change is that there is now an upper age limit of 23 years for a child or step-child to be included on a visa application, unless the child is incapacitated for work. There is, however, a provision that allows children who currently hold secondary visas, but are now over 23 years of age, to be eligible for further visas submitted in respect of their parents' visas. This will allow the family unit to remain together.

The definition has also been narrowed to exclude any extended family members outside of the visa applicant's immediate family. This means that only the spouse or de facto partner of the primary visa applicant and children or step-children of the primary visa applicant or his or her partner will be considered members of the family unit for immigration purposes.

Change to Condition 8107: Condition 8107 previously permitted Subclass 457 visa holders to remain in Australia for up to 90 days after they ceased employment with their sponsors. As of 19 November 2016, this has been reduced to 60 days. This change only applies to Subclass 457 visas granted on or after 19 November 2016.

Working Holiday visa: There are a number of changes proposed to the Subclass 417 Working Holiday visa, which are due to come into effect in January 2017.

Under the planned changes, the age limit for the working holiday visa will increase from 30 to 35 years. Further, there is to be a relaxation of work limitations. Currently, working holiday visa holders are only allowed to work for the same employer for six months, after the planned changes go into effect in January 2017, working holiday visa holders will be allowed to remain with the same employer for 12 months, provided that the second six months of employment is at a different premises in a different region.

It is important to note that the final changes to the working holiday visa have yet to be confirmed. More information will be available in January 2017.

Deloitte's view

The changes to the temporary activity visa framework will generate efficiencies and streamline processing of visa applications in the new visa subclasses. In addition, the introduction of online lodgements for all Subclass 400 visa applications is a welcome change that will improve consistency and lead to faster processing times.

The legislative changes to the temporary activity visa framework reflect the needs of businesses to mobilize foreign nationals in a timely and efficient manner for a variety of needs. Deloitte supports the Australian government's objective of reducing complexity and red tape in the immigration program.

The proposed changes to the working holiday visa program are consistent with the changing landscape of working holiday makers in Australia, including the desire of businesses to retain working holiday makers within their businesses for up to 12 months, in certain circumstances.

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Germany: Change to tax treatment of severance payments expected

Overview

Proposed legislation under consideration by the German parliament would change the tax treatment of severance payments (termination payments) in situations where a tax treaty was involved to bring the rules in line with the commentary to the OECD model tax treaty, in an effort to prevent cases of double taxation or double nontaxation. This measure is part of Germany's BEPS agenda, in respect of BEPS action 6 (prevention of treaty abuse).

The German Federal Tax Court (BFH) historically has ruled that the article in the OECD model treaty on income from employment (article 15) has to be interpreted in a such way that “true” severance payments (as opposed to pensions and deferred payments of wages) are to be treated as unrelated to services performed in the past. Instead, the court has treated the payments as compensation for the disadvantages of termination and the loss of earnings in the future. Under this interpretation, the right to tax the payments is allocated to the former employee’s state of residence at the time of payment.

This “German” approach differs from the approach taken in the OECD model treaty commentary (which would allocate the right to tax the severance payments to the country where the past services were performed), and from the approach taken in many countries following the commentary, including neighboring countries such as the Netherlands and Switzerland. As a result, there may be cases of double taxation or double nontaxation, particularly if a change of the former employee’s state of residence occurs.

For example, assume that A is an employee of a German GmbH, for which he performs services in Germany until 30 November of year 1. His contract is terminated, and he becomes entitled to a severance payment. On 1 December of year 1, he leaves Germany permanently and breaks residence to live in country B, which has concluded a tax treaty with Germany. The severance payment is made in year 2, when A is already a tax resident of country B.

Under current law, Germany would not tax A on his severance payment because, at the time of payment, he no longer is a resident of Germany, and Germany would consider the treaty to allocate the right of taxation to country B. If country B follows the interpretation that the right to tax the payment is allocated to the country of performance of (past) services, it also would not tax this income – there is a chance that there could be no taxation of the payment in either country.

The German tax authorities sought to prevent outcomes of this kind by concluding bilateral agreements with some foreign tax authorities to harmonize their interpretations of the treatment of severance payments. However, the BFH declared these agreements void because they lacked the authority of a formal law.

The government now intends to pass a formal law that would override the BFH’s interpretation of the treatment of severance payments. The law would introduce a new provision (section 50 d paragraph 12 of the income tax code) that would contain a statement that, for the purposes of the application of tax treaties, severance payments are “deemed” to relate to services rendered in the past, unless the treaty explicitly states otherwise (which rarely is the case).

If this rule becomes binding upon the courts, the result of the example above would change and Germany could tax A in year 2 on his severance payment, even though the individual no longer is a resident of Germany. Thus, the new law would dramatically change the result of some cases.

Deloitte’s view

The proposed new law has not yet passed parliament, but this is likely to take place before the end of 2016, particularly since it is part of Germany’s BEPS agenda. According to the draft wording, the new provision would be applied to severance payments made as from 1 January 2017.

Taxpayers should take the proposed legislation into consideration for future cases involving severance payments, as well as in cases where severance payments already are planned that could result in a different outcome under the proposed legislation.

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Korea: 2017 income tax law revisions approved by National Assembly

Overview

On December 2, 2016, the Korean National Assembly approved proposed income tax law revisions. The following is a selection of 2017 tax law revisions relevant to global employer services.

Changes to the application of the flat income tax rate for foreign employees

Under the Tax Incentives Limitation Law, foreigners are allowed a flat income tax rate election as an alternative to regular, progressive income tax rates when calculating individual income tax liability on earned income. If elected, a flat rate of tax may be applied to gross earned income, with no deductions, income exclusions, or tax credits allowed, in lieu of the regular, progressive individual income tax rates, which range from 6% to 40% (6.6% to 44%, including local income tax surcharge).

Effective January 1, 2017

Change to the flat income tax rate: In connection with numerous tax law revisions designed to achieve fair and equal taxation, the Ministry of Strategy and Finance (MOSF) has approved increasing the flat income tax rate to 20.9% (including local income tax surcharge of 1.9%) from 18.7% to decrease the taxation disparity between Korean nationals and foreign taxpayers.

Limited period for application of flat income tax rate election:

- Application of the flat income tax rate election is limited to a maximum of five (5) years from the start date of Korean employment (only applicable through December 31, 2018), if started prior to December 31, 2018.
- For cases in which a foreign employee began working in Korea prior to January 1, 2014, the flat income tax rate election will be allowed until the end of 2018, even if five (5) years have elapsed from the date of the employee's commencement of work in Korea.

Top marginal income tax rate increased

Currently, the top rate for individual income tax is 38% (41.8%, including local income tax surcharge), which is applied to taxable income over 150 million KRW. Starting on January 1, 2017, the top individual income tax rate will increase to 40% (44%, including local income tax surcharge) on taxable income over 500 million KRW.

New exit tax introduced

The new tax law revision also introduced an exit tax, effective January 1, 2018, in an effort to prevent offshore tax avoidance by tax residents who are going to be breaking tax residency through permanent departure from Korea (i.e., immigration). Please see below for more details:

- The exit tax is applicable to tax residents permanently leaving Korea who meet both of the following criteria:
 - Maintained permanent residence in Korea for a minimum of five (5) years in the ten (10) years leading up to the date of permanent leave
 - Considered a major shareholder of a domestic company, owning more than 1% of all shares valued at 2.5 billion KRW or more at the end of the preceding business year.
- When a tax resident meeting the above conditions breaks residency, the taxpayer is deemed to have disposed of relevant domestic shares on the final day of residency, and the deemed gain is subject to a tax rate of 22% (including local income tax surcharge).
- For the time being, only sales of shares in domestic companies are subject to exit tax (this may change in the future).
- The exit tax needs to be reported and paid within three months, starting from the last day of the month of expatriation. If not complaint, the person may be assessed a 20% non-reporting penalty.
- The exit tax assessment can be deferred for five years, if a tax agent is appointed or collateral is posted.

- Tax credits are available if any foreign taxes are paid on the gain or any loss is subsequently realized pursuant to the disposition of the shares.
- If the taxpayer returns to Korea to establish tax residency within five years of departure, any exit taxes paid will be refunded.

Deloitte's view

Companies should consider a relevant tax reimbursement cost increase for expatriates working in Korea. Additionally, companies should be very careful to withhold relevant income tax using the increased flat income tax rate and the increased top tax rate for high-income earners.

The exit tax may not have an apparent impact on many foreign nationals assigned to Korea, but it is advisable for expatriating Korean nationals and foreigners who spent significant amounts of time in Korea to check to see if they have exit tax filing requirements.

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United States:

IRS launches new online tool allowing taxpayers to check basic account information

Overview

As part of its effort to make tax information available to taxpayers in a secure, efficient manner, the US Internal Revenue Service (IRS) has launched a new online tool that allows individual taxpayers to view their IRS account balance. This tool is in addition to other online tools available to taxpayers, primarily related to online payment options. The IRS anticipates adding other capabilities to the online platform in the future as they are developed and tested.

URL: <https://www.irs.gov/payments/finding-out-how-much-you-owe>

Online tool

Individual taxpayers now may check their current balance due online. The balance will reflect any amounts owed for taxes, penalties, and interest. It will be updated no more than once every 24 hours, usually overnight. Taxpayers may use this tool to determine their current payoff amount, which is calculated through the current calendar day and the balance for each tax year for which there is an amount owed. Taxpayers will have the ability to immediately pay the balance using one of the IRS online payment options.

Security

Consistent with continuing efforts to protect taxpayer data, taxpayers will be required to authenticate their identity through the IRS' Secure Access process. Users who have previously registered through Get Transcript, Identity Protection PIN (IP PIN), Online Payment Agreement (OPA), or ePostcard may use the same username as password to access account balances. New users will need to follow the Secure Access registration process, which requires the following:

- Social Security Number, date of birth, filing status, and mailing address from their latest tax return
- Access to an email account;
- A personal account number from a credit card, mortgage, home equity loan, home equity line of credit, or car loan; and
- A US-based mobile phone that can receive text messages, with the taxpayer's name on the account.

As part of the security process to authenticate taxpayers, the IRS will send verification, activation, or security codes via email and text. However, the IRS reminds taxpayers that it will not initiate contact via text or email asking for log-in information or personal data. The IRS texts and emails will only contain one-time codes.

For more details, visit the IRS website.

URL: <https://www.irs.gov/individuals/secure-access-how-to-register-for-certain-online-self-help-tools>

Deloitte's view

The new "balance due" feature is a continuing enhancement of the IRS' online taxpayer tools. When paired with existing online payment options, the new tool provides a fast and secure way for taxpayers to settle current tax obligations.

Taxpayers are reminded, nonetheless, that the protection of their personal information is paramount. In the current environment, with many phishing scams prevalent, taxpayers need to stay diligent with their personal information and stay aware of the security features that the IRS implements to protect taxpayer data. It is important to follow the IRS security guidelines when registering for these online tools and to heed all IRS warnings that are issued regarding various scams.

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