

California Legislature Allows Group Returns for International Business Travelers

Overview

Business travelers from outside the United States who travel to California on business trips raise unique tax compliance considerations for their employers.¹ California may be a particularly challenging location for companies with international business travelers, because California taxes nonresidents on compensation for services performed in California and generally does not follow tax treaties between the United States and foreign countries, unless the treaty specifically provides that it applies to state taxes.²

To ease the tax compliance and administrative burden for companies and employees, on September 18, 2020, California's Governor signed Assembly Bill 2660 ("A.B. 2660") into California law.³ Among other things, A.B. 2660 allows certain nonresident aliens to elect to file in a group return if they receive taxable income for services performed in California. The bill also prohibits the California Franchise tax Board (FTB) from requiring a nonresident alien who is not eligible for, or has not been issued, an "identifying number"—generally a federal social security number (SSN) or an individual tax identification number (ITN)—to provide one in order to be included in the group return.⁴ Generally, these new provisions apply to taxable years beginning on or after January 1, 2021, and before January 1, 2026.⁵

This Tax Alert provides an overview of the primary challenges faced by nonresident alien employees and their employers, summarizes the alternatives offered under A.B. 2660, and provides some taxpayer considerations.

Overview of Primary Challenges

California imposes a personal income tax return filing and tax payment obligation on nonresidents, including nonresident aliens, who travel to California and perform services while there, even if for short periods of time.⁶ Historically, California has only allowed S corporations, partnerships, and limited liability companies to file group nonresident returns on behalf of their nonresident owners, to report California-source pass-through income, and C Corporations to file group nonresident returns on behalf of their nonresident directors to report compensation received for services.⁷ California law also required that nonresident "identifying numbers" be included on all "state tax returns, statements, and other documents."⁸

However, obtaining identifying numbers can be difficult for international travelers, because SSNs are generally not issued to nonresident aliens, and individuals who enter the U.S. to work for only a short period of time face a time consuming and

¹ See A.B. 2660, 2019-2020 REG. SESS. (CAL. 2020), ASSEMBLY FLOOR ANALYSIS, dated June 5, 2020 (available [here](#)).

² See CAL. REV. & TAX CODE § 17951; CAL. CODE OF REGS., TIT. 18, §§ 17951-1, 17951-2, 17951-5; *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 196-197 (1983); *Appeal of M.T. de Mey van Streefkerk*, 85-SBE-135, Nov. 6, 1985; FTB Publication 1031 (2019) at 10; FTB Publication 1001 (2019) at 4; FTB Residency and Sourcing Technical Manual, § 3720.

³ A.B. 2660, 2019-2020 REG. SESS. (CAL. 2020) (available [here](#)); see also ASSEMBLY FLOOR ANALYSIS, dated June 5, 2020; Governor Newsom's Announcement, September 18, 2020, (available [here](#)).

⁴ See A.B. 2660, 2019-2020 REG. SESS., §§ 2-3 (adding new Cal. Rev. & Tax Code § 18537 and § 18624, respectively). New Cal. Rev. & Tax Code § 18624(f)(2) defines "nonresident alien" to mean an individual other than a California resident who is neither a U.S. citizen nor a U.S. resident.

⁵ A.B. 2660, 2019-2020 REG. SESS., §§ 2, 3.

⁶ See CAL. REV. & TAX CODE §§ 17951, 18501; CAL. CODE OF REGS., TIT. 18, §§ 17951-1, 17951-2, 17951-5; A.B. 2660, 2019-2020 REG. SESS. (CAL. 2020), LEGISLATIVE COUNSEL'S DIGEST (available [here](#)); ASSEMBLY FLOOR ANALYSIS, dated June 5, 2020.

⁷ CAL. REV. & TAX CODE §§ 18535, 18536.

⁸ CAL. REV. & TAX CODE § 18624; see also A.B. 2660, 2019-2020 REG. SESS. (CAL. 2020), LEGISLATIVE COUNSEL'S DIGEST.

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often costly multi-step process in order to receive an ITIN.⁹ As a result, California law “lack[ed] an effective mechanism to remit taxes with respect to this group of employees.”¹⁰

Alternatives Provided under A.B. 2660

For taxable years beginning on or after January 1, 2021, and before January 1, 2026, A.B. 2660 amends California Revenue and Taxation Code (“CRTC”) Section 18624 to “prohibit the Franchise Tax Board from requiring a nonresident alien, as defined, to provide a SSN or ITIN when filing a state tax return, statement, or other document if the nonresident alien is not eligible for or has not been issued a SSN or ITIN.”¹¹ However, if the nonresident subsequently becomes eligible for and is issued a SSN or ITIN, the FTB is permitted to require the nonresident alien to provide a letter or other form documenting the nonresident’s SSN or ITIN.¹²

Additionally, A.B. 2660 adds new CRTC Section 18537, pursuant to which the FTB “shall provide for the filing of a group return by a taxpayer, or an entity authorized by the taxpayer to file on its behalf, for one or more electing nonresident aliens who receive taxable income...for services that take place in this state.”¹³ A nonresident alien who elects to file in a group return will be taxed at “the highest marginal rate or rates provided for by [the Personal Income Tax Law] plus, in the case of any electing nonresident alien included on the group return who would be subject [CRTC] Section 17043 [(the Mental Health Services Tax)] when filing individually, an additional tax of 1 percent, and no deductions or credits shall be allowed, except credits allowed under [CRTC] Section 19002 [(relating to withholding of tax)].”¹⁴ Furthermore, the “taxpayer, or an entity authorized by the taxpayer to file on its behalf, as the agent for the electing nonresident aliens, shall make the payments of tax, additions to tax, interest, and penalties otherwise required to be paid by, or imposed on, the electing nonresident aliens.”¹⁵ Amounts paid on behalf of the electing nonresident aliens are excluded from the nonresident alien’s gross income.¹⁶ A.B. 2660 also amends CRTC Section 19002 to provide that, in the case of a nonresident alien electing to file in a group return under new CRTC Section 18537, tax that is “withheld under Article 5 (commencing with Section 18661) of Chapter 2 or Section 13020 of the Unemployment Insurance Code during any calendar year shall be allowed to the recipient of the income as a credit against the tax for the taxable year with respect to which the amount was withheld.”¹⁷

Considerations

These new provisions of California law apply to taxable years beginning on or after January 1, 2021, and before January 1, 2026.¹⁸ As stated by the author of A.B. 2660, “[t]his commonsense bill gives international companies the option of filing a group return for their foreign employees who travel to California for work and incur a personal income tax liability. . . . In this manner, this bill provides a significant benefit to the business community by easing tax compliance and administrative

⁹ See A.B. 2660, 2019-2020 REG. SESS. (CAL. 2020), SENATE FLOOR ANALYSES, dated August 15, 2020 (available [here](#)) (stating also that SSNs are generally issued to U.S. citizens, permanent residents, and some temporary residents. The IRS issues ITINs to certain nonresidents, their spouses, and dependents who are not eligible to receive a SSN. To obtain a federal ITIN, an individual must file IRS Form W-7 and provide a copy of an original federal tax return and other identifying documentation).

¹⁰ A.B. 2660, 2019-2020 REG. SESS. (CAL. 2020), ASSEMBLY FLOOR ANALYSIS, dated June 5, 2020.

¹¹ See A.B. 2660, 2019-2020 REG. SESS. (CAL. 2020), LEGISLATIVE COUNSEL’S DIGEST; see A.B. 2660 §§ 2 and 3 (adding Cal. Rev. & Tax Code § 18537 and amending Cal. Rev. & Tax Code § 18624 to add new subsections (f) and (g)).

¹² See A.B. 2660 § 3 (amending Cal. Rev. & Tax Code § 18624 to add subsection (f)).

¹³ See A.B. 2660 § 2 (new Cal. Rev. & Tax Code § 18537(a)). The express language of new CRTC Section 18537(a) states that these new provisions apply to “taxable years beginning on or after January 1, 2021, and until January 1, 2026” (rather than “before” January 1, 2026) (emphasis added). However, the Legislative Digest to A.B. 2660 states that “[t]his bill would require the [FTB], for taxable years beginning on or after January 1, 2021 and before January 1, 2026, to provide for the filing of a group return for electing nonresident aliens, as specified, and would exclude from gross income any payments made by an agent on behalf of a nonresident income in a group filing.” (emphasis added). Moreover, new CRTC Section 18624(f)(1) also uses “before January 1, 2026” when stating the dates to which new subsection (f) applies. Therefore, it is unclear whether the California Legislature intended to apply new CRTC Section 18537 to taxable years “until” or “before” January 1, 2026.

¹⁴ See A.B. 2660 § 2 (new Cal. Rev. & Tax Code § 18537(b)).

¹⁵ See A.B. 2660 § 2 (new Cal. Rev. & Tax Code § 18537(c)).

¹⁶ See A.B. 2660 § 1 (new Cal. Rev. & Tax Code § 17132.1(a)).

¹⁷ See A.B. 2660 § 5 (amending Cal. Rev. & Tax Code § 19002 to add new subsections (f) and (g)).

¹⁸ See *supra* n. 13. A.B. 2660 also indicates that these new provisions shall remain in effect only until December 1, 2026, and as of that date is repealed. See A.B. 2660, §§ 2 (new CRTC § 18537(h)); 3 (new CRTC § 18624(g)); 5 (new CRTC § 19002(g)).

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burdens for both companies and employees alike.”¹⁹ This Alert covers the more notable changes made by A.B. 2660, but it is not comprehensive. As A.B. 2660 includes significant changes to California’s tax laws and procedures, taxpayers should consult with their California tax advisors regarding the changes made by A.B. 2660 and the impact these changes may have on their businesses and California tax liabilities.

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¹⁹ See SENATE FLOOR ANALYSES, dated August 15, 2020; ASSEMBLY FLOOR ANALYSIS, dated June 5, 2020.