

Employing staff in the United States

A guide to employer obligations

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1. Introduction



This brochure provides some of the relevant requirements that govern the employment of staff in the United States. We emphasize that US employment is governed by federal, state and local laws and coordination of these requirements can be complicated, particularly when employees work across multiple US jurisdictions. Accordingly, the information contained herein is not intended to be comprehensive, but rather offers an overview of the primary considerations and areas where federal, state and local laws may apply.

This brochure is provided solely for the purpose of enhancing knowledge on tax matters. It does not provide tax advice to any taxpayer because it does not take into account any specific taxpayer's facts and circumstances. It is not intended, and should not be relied upon, as tax, accounting, or legal advice. Neither EY nor any member firm thereof shall bear any responsibility whatsoever for the content, accuracy, or security of any third-party websites that are linked (by way of hyperlink or otherwise) in this brochure.

Federal, state and local rules are complex and change frequently. Please feel free to contact debera.salam@ey.com for more detailed information on US employment obligations.

2. US federal wage tax obligations

2.1 General

In the US, federal wage taxes consist of Social Security/Medicare (FICA), federal income tax (FIT) and federal income tax withholding (FITW), and federal unemployment insurance (FUTA).

- ▶ **FICA.** For 2021, employers and employees pay Social Security tax at 6.2% of covered wages up to \$142,800 for the year. Employers and employees pay Medicare tax at 1.45% of all covered wages. Employees pay Additional Medicare Tax of 0.9% on all wages in excess of \$200,000. Certain US visa holders are exempt from FICA tax and a Social Security treaty exemption may apply to certain US nonresident aliens. (See Section 7.0.)
- ▶ **FUTA.** For each covered employee, employers pay 6.0% of covered wages up to \$7,000 for the year. A maximum credit of up to 5.4% applies, making the net FUTA tax rate 0.6% for most employers that pay their state unemployment insurance taxes on time and for the full amount. Exemptions from FUTA apply to public sector employers, nonprofit organizations and certain US visa holders. Note that the net FUTA tax rate was higher in 2020 for the US Virgin Islands due to its outstanding federal unemployment insurance loan balance.
- ▶ **FIT and FITW.** Employers are required to withhold federal income tax from employees' covered wages. FITW is computed based on information provided on the Form W-4, *Employee's Withholding Allowance Certificate*, and withholding schedules published by the Internal Revenue Service (IRS) annually in Publication 15-T, *Federal income tax withholding methods*. US nonresident aliens may be eligible for an exemption from FIT and FITW under a treaty agreement. (See Section 7.0.)

2.2 Tax payments and reporting

Employers are required to make payments of federal wage taxes according to IRS payment schedules and to file the related employment tax returns. With limited exceptions, all federal wage tax payments must be paid electronically and with funds from a US financial institution.

- ▶ **Form 941, *Employer's Quarterly Federal Tax Return*.** Employer and employee FICA contributions and FITW are reported with the taxable wage amounts on Form 941. The Form 941 is filed at the end of the month following the close of the calendar quarter (due dates April 30, July 31, October 31 and January 31). Depending on the amount of the Form 941 liability in the lookback period, tax payments are made with the IRS at a frequency of quarterly, monthly, semiweekly or daily. By special approval with the IRS, employers with a small Form 941 liability may file an annual Form 944 rather than the quarterly Form 941.
- ▶ **Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*.** The total annual FUTA liability is reported on Form 940 by January 31 following the close of the calendar year. Liabilities of more than \$500 at the end of the first three calendar quarters must be paid to the IRS within 30 days following the end of the calendar quarter (due April 30, July 31 and October 31), with the total unpaid balance at the end of fourth quarter (December 31) due by January 31.
- ▶ **Form W-2, *Wage and Tax Statement*.** Employers are required to report FIT and FICA wages and taxes withheld on the annual Form W-2. The employee's copy must be given to employees by January 31 following the close of the calendar year and the federal copies are filed with the Social Security Administration (SSA) by January 31 following the close of the calendar year.

2.3 Federal registration

All US employers must obtain a federal Employer Identification Number (EIN) from the IRS. To apply for an EIN, US employers must complete Form SS-4, [*Application for Employer Identification Number*](#). The Form SS-4 must list an individual with a US Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN) as the party personally liable for unpaid federal employment tax obligations.

2.4 Employee documents

All US employees must complete and submit to their employers a Form W-4, [*Employee Withholding Allowance Certificate*](#). The Form W-4 provides information necessary for the employer in determining the amount of federal income tax to withhold from taxable wages. Special instructions for completing the form apply to US nonresident alien employees as explained in [*Publication 15*](#).

If US nonresident alien employees are claiming a treaty exemption from FITW, they must complete and submit to the employer Form 8233, [*Exemption From Withholding on Compensation for Independent \(and Certain Dependent\) Personal Services of a Nonresident Alien Individual*](#).

All US employees are required to obtain an SSN from the SSA. Employees apply for an SSN by completing Form SS-5, [*Application for a Social Security Card*](#). It is suggested, but not required, that employers photocopy the employee's Social Security card and retain in their records as confirmation of the employee's name and SSN as recorded by the SSA.



2.5 Recordkeeping

The IRS requires that employers maintain records related to wage tax for a period generally of not less than four years. Pursuant to Form 941-related documents, the four-year period begins April 15 following the tax year of the document and January 31 for documents pertaining to the Form 940.

Documents required to be retained include:

- ▶ Forms W-4
- ▶ Forms 941
- ▶ Forms 940
- ▶ Forms W-2
- ▶ Each employee's name, date of birth, address, SSN, occupation, dates of employment and employee ID if used in the place of the name on any file or record
- ▶ Gender and occupation (e.g., job title or job description)
- ▶ Payroll period end dates and payment dates
- ▶ Canceled and voided checks
- ▶ Dates and amounts of wage tax deposits made
- ▶ Total amount and date of each wage payment, annuity and pension payment, reported tips and the fair-market value of wages-in-kind, and the period of service covered by each payment
- ▶ Amount of FIT, FICA and FUTA taxable wages
- ▶ Amount of FIT and FICA withheld and, if withheld at a time other than the time when the wages were paid, the date collected
- ▶ If total wages paid and the amount subject to tax are not equal, the reason why
- ▶ Any adjustments or settlements of taxes
- ▶ Records of fringe benefits provided, including substantiation
- ▶ Periods for which employees were paid while absent due to sickness or injury and the amount or weekly rate of payment made by the employer or third party
- ▶ Copies of any statements furnished by employees relating to nonresident alien status, residence in Puerto Rico or the Virgin Islands, or residence or physical presence in a foreign country
- ▶ The amount the employer paid into the state unemployment fund
- ▶ Record of deductions made pursuant to a notice of IRS tax levy, including calculations used to arrive at the amount of the deduction
- ▶ The total amount that employees contributed through payroll deductions to a charity, including a statement from the charitable organizations that no goods were provided in exchange for the donation

3. US state and local wage tax obligations

3.1 State and local income tax

All states impose an income tax and an income tax withholding requirement except for Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington and Wyoming.

In general, income tax withholding is mandatory on all covered wages paid in the employee's resident state and on all covered wages paid for services performed in a nonresident state. Only 25 states offer a de minimis exception to the nonresident state income tax withholding requirement. Many states require that employees submit to their employers a state-specific withholding allowance certificate (similar in purpose to the Form W-4) for use in determining the amount of state income tax to withhold.

Local payroll taxes for county, city and/or school districts are also imposed for localities within Alabama, Delaware, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania and West Virginia. Withholding allowance certificates are required by some of these local taxing authorities.

Each state and locality imposes its own tax payment schedule. Periodic returns of income tax withholding are also required with varying due dates, and most require that an annual state/local Form W-2 be provided to employees and filed with the taxing authority.



3.2 State unemployment insurance

Under federal law, all states are required to have a state unemployment insurance (SUI) system. As a result, all US states impose a SUI tax that is paid only by employers except in Alaska, New Jersey and Pennsylvania, where employees also pay SUI tax.

Unlike income tax withholding, SUI tax applies only in one state as determined by a [four-prong test](#) that establishes the state of liability. In contrast to FUTA, SUI tax rates vary by state and employer according to the condition of the state's unemployment insurance trust fund and the amount of unemployment insurance benefits charged to the employer's account.

SUI tax applies only up to the annual taxable wage base, which is determined under state law. Under federal law, a state's SUI taxable wage base cannot be less than \$7,000.

SUI returns and wage reports are due at the end of the month following the close of the quarter (due dates April 30, July 31, October 31 and January 31). Note that an exception applies to Illinois, where wage reports are filed monthly (but the SUI returns are due quarterly).



3.3 Other state and local taxes

Other possible state and local taxes paid by the employer, employee or both may include:

- ▶ State disability insurance (SDI)
- ▶ Paid family and medical leave insurance (PFML)
- ▶ Workers' compensation insurance tax (in addition to, or in lieu of a workers' compensation insurance premium)
- ▶ Business expense tax ("head tax")
- ▶ Occupational privilege tax (OPT)
- ▶ Transit tax

3.4 Other state and local reporting obligations

As a result of certain federal programs, states may impose other employment reporting requirements on employers, such as:

- ▶ **New hire reporting.** All employers are required to submit reports of their new hires to the state (or optionally, may submit their reports directly to the Federal Office of Child Support Enforcement). New hire reporting is used to enforce family support obligations and to prevent fraud in the filing of unemployment insurance claims. More details are available [here](#).
- ▶ **Multiple worksite reporting (MWR).** The U.S. Bureau of Labor Statistics maintains information about geographic employment and to support this effort, a number of states mandate that employers submit MWR forms. More details are available [here](#).
- ▶ **Occupational employment reporting.** The U.S. Bureau of Labor Statistics maintains vital statistics about occupations and wages. In support of this effort, it conducts a survey of employers that is mandatory in some states. More details are available [here](#).

3.5 State and local registrations

When doing business in the US, employers must register in every state where they pay wages subject to a wage tax. Thus, registration is required in each state where SUI taxes are paid and in each state where income tax is withheld. In many states, employers must register separately for SUI and income tax withholding.

Registration is also required for each locality where the employer is required to withhold or pay taxes.

State and local registration forms can be complex, and the failure to properly complete them can result in costly assessments. Businesses frequently seek assistance from their tax advisors to complete the registration process.

3.6 Geocoding

Identifying the local wage taxes that apply depends on the precise geographic location of the employee's resident and work location and the corresponding geographic tax boundaries. Accordingly, identifying the applicable local taxes may require the use of geocoding software that can accurately identify the local taxes that apply for each employment scenario.



4. Taxable and nontaxable wages

Another complexity in US wage tax compliance is the variation in how taxable wages are defined.

- ▶ **FIT and FITW.** All compensation and benefits provided to employees in connection with their services to the employer are taxable with limited exceptions. For instance, insurance premiums paid for employee health and disability, qualified retirement plan contributions and working condition fringes (e.g., job-related education) are some of the items that are excluded from wages subject to FIT and FITW.
- ▶ **FICA.** The definition of covered wages for FICA purposes differs from the definition that applies for FIT/FITW purposes. Of particular note, employee contributions to a qualified retirement plan are excluded from FIT/FITW taxable wages but they are included in FICA covered wages. Other differences also apply.

- ▶ **FUTA.** The definition of FUTA taxable wages follows the FICA definition with limited exceptions.
- ▶ **See our 2020 federal reporting chart.** For a summary chart of the federal reporting of the most commonly provided fringe benefits, see our [special report](#).
- ▶ **State income tax and income tax withholding.** States do not necessarily adopt the federal definition of taxable wages under the Internal Revenue Code (IRC). Some states conform to the IRC only as of a specific date; others must annually confirm their adoption of the IRC; and still others maintain their own unique taxable wage definition. For this reason, it is important that businesses annually review state (and local) taxability.
- ▶ **Local income tax and income tax withholding.** Localities sometimes do not adopt the state definition of taxable wages and in some cases (e.g., Kentucky locals), the taxable wage definition can vary for each locality.



5. Labor law

US businesses must comply with federal, state and local labor laws. These laws govern work conditions, minimum wage, hours of work, the frequency and manner of making wage payments, meals and rest periods, and the requirement for certain benefits such as paid and unpaid leave.

Federal labor requirements are enforced by the U.S. Department of Labor; state labor laws are enforced by state labor departments; and local laws are generally enforced by the city mayor or a county agency.

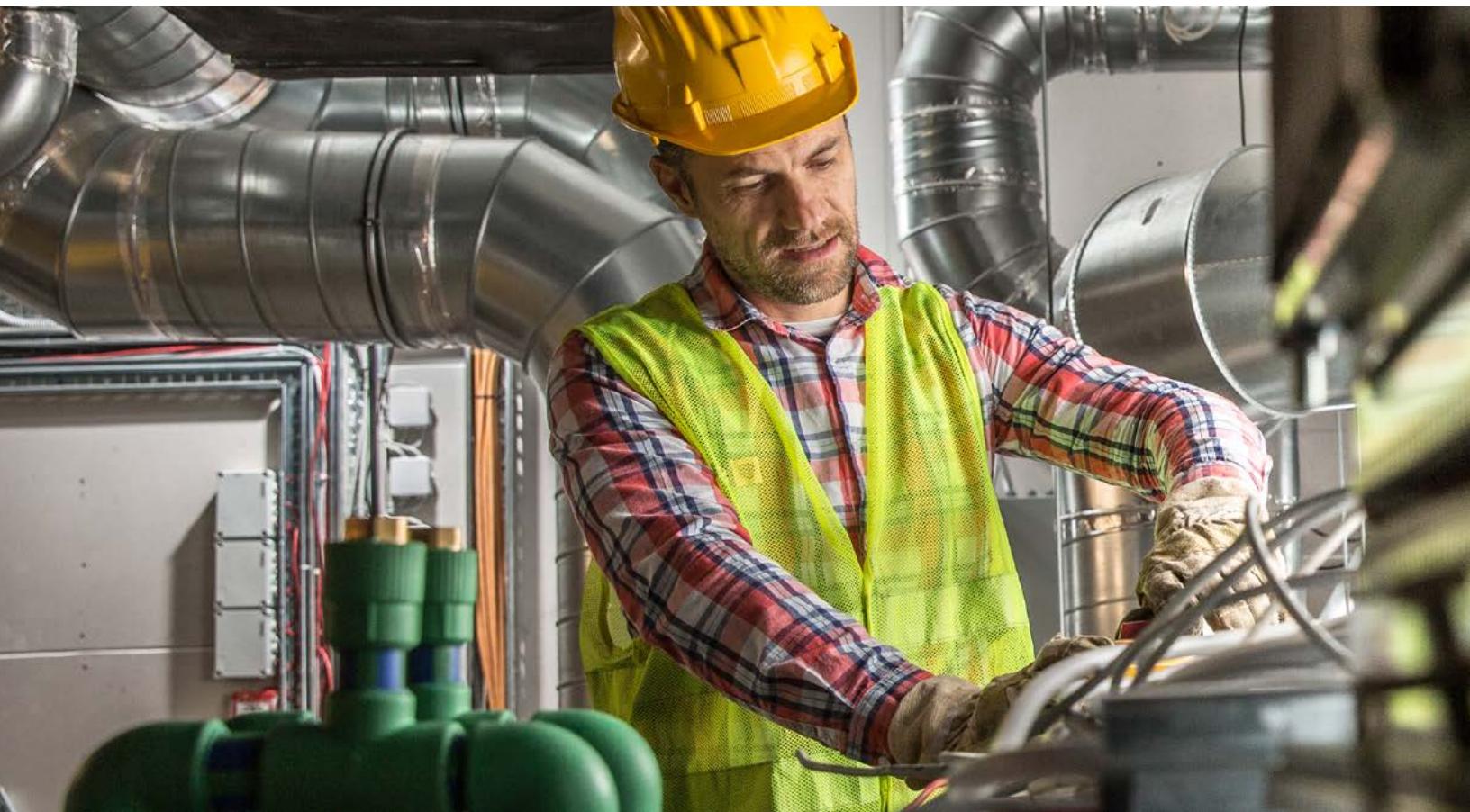
When federal and state/local laws apply, employers generally comply with the law most beneficial to the employee. For instance, where the federal minimum wage is \$7.25 per hour and state minimum wage is \$10, the employee must be paid at least \$10 per hour.

For a listing of the applicable state minimum wage as of January 1, 2021, see EY Tax Alert [2020-2862](#).

Following are some of the labor laws that apply:

- ▶ **Workers' compensation insurance.** Most states require that employers carry workers' compensation insurance that provides coverage for medical expenses and disability for work-related injuries and illnesses. Except in monopolistic states where workers' compensation insurance is provided only through a state fund, employers generally purchase this insurance through private carriers. More information is available [here](#).
- ▶ **Health insurance coverage.** There is no federal labor requirement to provide health insurance to employees; however, under the [Affordable Care Act \(ACA\)](#) large employers are subject to a monetary penalty from the IRS for failure to provide a minimum level of health insurance coverage to employees. The penalty provisions apply to an employer with 50 or more full-time employees or full-time equivalents.
- ▶ **Minimum wage.** Under federal law, employees must generally be paid at least \$7.25 per hour. States and localities may require a higher hourly minimum wage.
- ▶ **Overtime pay.** Under federal law, nonexempt employees must generally be paid 1.5 times the regular rate of pay for all hours actually worked over 40 hours per week. An exemption from the overtime pay requirement applies to certain categories of employees (e.g., executive, administrative and professional) provided the requirements are met. Some states and localities may require overtime pay for exceeding a daily hours threshold and in some instances may require an overtime rate of two times the regular rate of pay. More information on the federal overtime pay requirements is available [here](#).
- ▶ **Method of payment.** In general, wages must be paid by cash or check. Most states permit payment by direct deposit or by debit card but only with the written consent of employees and only if employees are not subject to a fee to withdraw their pay.
- ▶ **Frequency of wage payments.** Most states regulate the frequency at which employees must be paid. For instance, some states require that hourly employees be paid no less frequently than every two weeks.
- ▶ **Pay statements.** Many states have specific requirements for the information that must be provided to employees each payday, including regular hours, regular pay, overtime hours and overtime pay.
- ▶ **Paid time off.** There is no requirement for paid time off under federal law (an exception applies for employers with fewer than 500 employees who are absent for reasons connected with COVID-19). Hence there is no requirement to pay employees for time off they take for sick leave, holiday, vacation, etc. Numerous states and localities do impose paid time off for illness and other purposes.

- ▶ **Unpaid leave.** The federal [Family and Medical Leave Act \(FMLA\)](#) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Most states impose requirements similar to the FMLA. Some states and localities also require unpaid leave for jury duty, voting, surgery for certain organ donors and for other purposes.
- ▶ **Deductions from pay.** Federal, state and local laws limit what employers may deduct from the wages of employees. For instance, under federal law certain deductions, such as taxes required to be paid by the employer, are prohibited and the cost of uniforms cannot be deducted from minimum wage or overtime pay. State and local laws can be more restrictive, such as allowing no payroll deductions without the employee's written consent.
- ▶ **Other benefits.** State law may also mandate that certain benefits be provided to employees. For instance, a few states require that employers with no qualified retirement plan automatically enroll their employees into the state retirement plan. A few localities require that employers have a program that allows their employees to pay for their public transportation expenses with pre-tax, tax-advantaged spending accounts.



6. Immigration verification obligations

It is unlawful to hire employees to work in the US who are not US citizens or nonresident aliens with the proper US work authorization.

As a matter of enforcement of this law, *all* US employers are required to verify that all employees are legally permitted to work in the US. This includes temporary and part-time employees and all individuals, regardless of whether they appear to be US citizens. The Form I-9, *Employment Eligibility Verification*, is used for this purpose.

All US employers must confirm their proper completion of Form I-9 for each individual they hire for employment in the US. This includes citizens and noncitizens. Both employees and employers (or authorized representatives of the employer) must

complete the form. On the form, employees must attest to their employment authorization. Employees must also present their employer with acceptable documents evidencing identity and employment authorization. The documents allowed for this process are provided in the Form I-9 instructions.

The employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and to relate to the employee and record the document information on the Form I-9.

Employers must retain Form I-9 for a designated period and make it available for inspection by authorized government officers.

More information is available [here](#).

7. Social Security and income tax treaties

To reduce the burden of double taxation when nonresident aliens work in the US, two systems exist: Social Security totalization agreements that provide relief from FICA taxes and income tax treaties that provide relief from FIT and FITW.

7.1 Social Security totalization agreements

Social Security totalization agreements eliminate dual social tax when a worker is required to pay such tax on the same earnings in more than one country. These totalization agreements also fill gaps in benefit protection when workers have divided their careers between the US and another country

The exemption from US FICA tax under a totalization agreement applies for a limited period, generally five years.

In order for the FICA exemption to apply under the totalization agreement, the employee must present to the US employer a certificate of coverage from the foreign country. The FICA exemption does not apply until the US employer is in receipt of this certificate of coverage.

US Social Security totalization agreement countries (as of January 11, 2021)

Australia	Germany	Poland
Austria	Greece	Portugal
Belgium	Hungary	Slovenia
Brazil	Iceland	Slovak Republic
Canada	Ireland	South Korea
Chile	Italy	Spain
Czech Republic	Japan	Sweden
Denmark	Luxembourg	Switzerland
Finland	Netherlands	United Kingdom
France	Norway	Uruguay

For a list of the most current US totalization agreement countries, see the SSA [website](#).

7.2 Income tax treaties

US nonresident aliens may be able to claim exemption from federal income tax withholding if there is an income tax treaty between the US and their country of residence. This exemption is claimed by completing Form 8233, *Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual*. The employee signs three copies of Form 8233. One copy is submitted to the employer; the second copy is submitted to the IRS within five days of the employer's acceptance of the form; and the third copy is retained by the employee. This process must be completed each year the employee is claiming the treaty exemption.

Countries that have an income tax treaty with the US (as of January 11, 2021)

Armenia	France	Lithuania	South Africa
Australia	Georgia	Luxembourg	Spain
Austria	Germany	Malta	Sri Lanka
Azerbaijan	Greece	Mexico	Sweden
Bangladesh	Hungary	Moldova	Switzerland
Barbados	Iceland	Morocco	Tajikistan
Belarus	India	Netherlands	Thailand
Belgium	Indonesia	New Zealand	Trinidad
Bulgaria	Ireland	Norway	Tunisia
Canada	Israel	Pakistan	Turkey
China	Italy	Philippines	Turkmenistan
Cyprus	Jamaica	Poland	Ukraine
Czech Republic	Japan	Portugal	USSR
Denmark	Kazakhstan	Romania	United Kingdom
Egypt	Korea	Russia	Uzbekistan
Estonia	Kyrgyzstan	Slovak Republic	Venezuela
Finland	Latvia	Slovenia	

For a list of the most current US income tax treaties, see the IRS [website](#).

8. Employer checklist

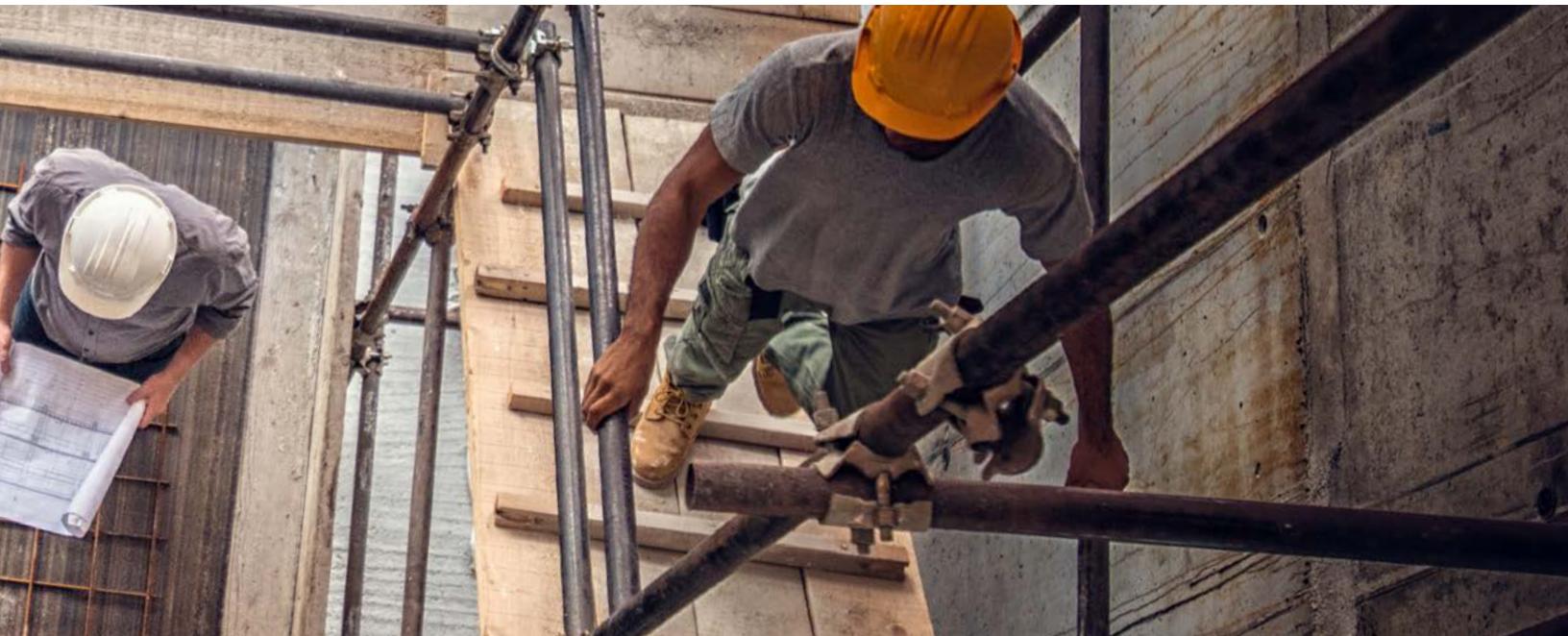
Below is a summary of the most significant action items to consider when hiring staff to work in the US.

- ▶ Create a list of the federal, state and local tax jurisdictions where you have or will employ staff and determine the wage tax and labor obligations that apply. Consider consulting with a US labor law advisor concerning the special labor law requirements that apply for the jurisdictions in which staff will provide services.
- ▶ Consider how you will correctly identify the local wage taxes that apply (e.g., do you or tax advisor have access to geocoding software?)
- ▶ Register with all federal, state and local taxing authorities where wage tax and reporting apply. Consider consulting with a US employment tax advisor in meeting these requirements.
- ▶ In order to meet the requirements for registering with the IRS for an EIN, first apply for and obtain an SSN or ITIN.
- ▶ If you do not have a US financial institution from which you fund wage and tax obligations, identify a shadow payroll service provider that can work with you.
- ▶ Identify if you have the technological infrastructure to meet your wage payment, wage tax and reporting requirements and if not, identify a US payroll service provider that can assist you.
- ▶ Obtain and retain all required federal, state and local income tax withholding certificates required from US employees.
- ▶ Identify the fringe benefits that will be provided to employees and determine the federal, state and local taxability that applies to these benefits. Identify the US requirements for plan documents to qualify for the tax-favored tax treatment of certain benefits.
- ▶ Identify the employees who are exempt from FICA, FIT and FITW, confirming that you have all required documentation on file to support the exemptions claimed.
- ▶ Complete the Form I-9 employment verification process for each US employee and retain all documents in your files.



Acronyms

EIN	Employer Identification Number.
FICA	Federal Insurance Contribution Act. Refers to Social Security and Medicare tax.
FIT	Federal income tax
FITW	Federal income tax withholding
FUTA	Federal Unemployment Insurance Tax Act. Refers to federal unemployment insurance tax.
IRC	Internal Revenue Code
IRS	Internal Revenue Service
ITIN	Individual Taxpayer Identification Number
PFML	Paid family and medical leave
SDI	State disability insurance
SIT	State income tax
SITW	State income tax withholding
SSA	Social Security Administration
SSN	Social Security Number
SUI	State unemployment insurance



Ernst & Young LLP is here to help

Our Employment Tax Advisory Services team offers comprehensive services to assist foreign employers with their US wage tax and reporting requirements. Below is the broad range of services we provide.

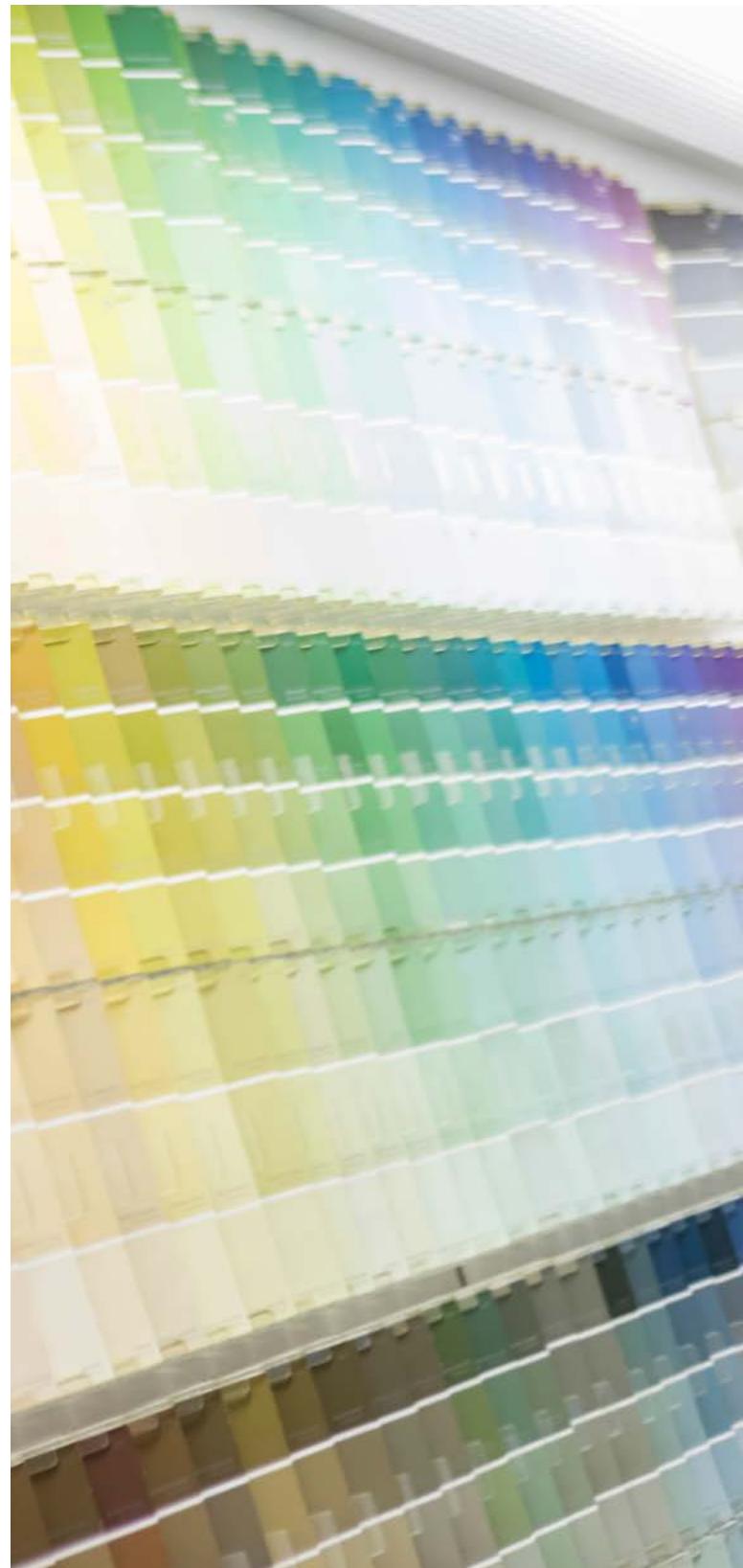
Employee wage tax onboarding

- ▶ Review foreign payroll records to identify nonresident aliens and identify US visas that result in exemptions from FICA and FUTA.
- ▶ Assist in the collection of onboarding documents for US payroll tax compliance.
- ▶ Provide geocoding services to identify the local wage taxes that apply.
- ▶ Co-present employee orientation meetings and assist in developing employee communications.
- ▶ Co-develop payroll and human resources policies and procedures.

Employer wage tax compliance

- ▶ Assist with federal, state and local tax registrations.
- ▶ Identify federal, state and local taxability for all wage and deduction types for FIT, FITW, FICA, FUTA and state and local wage taxes.
- ▶ Each pay period extract wage details from local payroll register data and download latest employee tax demographic data.
- ▶ Compute federal, state and local withholding and employment taxes and prepare import files for US shadow payroll.
- ▶ Where needed, assist with payroll tax payments and deposits.

View a brochure of our employment tax advisory services [here](#). View all of our special reports [here](#).





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