THE 180-DAY RULE FOR CANADIAN VISITORS – LAW OR LEGEND?

Smarter Way to Cross Blog Archives
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How Many Days Can I Be in the United States?

We get inquiries from time to time from seasonal "snowbirds," as well as from sales personnel, account managers, and others who make frequent and/or lengthy trips to the United States. They have heard about a so-called "180-day rule" that offers safety to the Canadian visitor who stays on the short side of it and adverse consequences to those who exceed it. The number 180, often expressed in more exact terms as an 183-day rule, relates to a six-month time frame or one-half of a calendar year, depending on the context. While there may be a kernel truth and usefulness in such a rule, it is really a blending of two rules that results in getting them both wrong.

On one side, you have the immigration rule that allows Canadian visitors to the United States a maximum admission of six months. Although Canadians citizens typically do not get a passport stamp or entry document that authorizes entry for a specific term, U.S. Customs and Border Protection (CBP) takes the position that Canadians citizens are deemed to be admitted for a maximum of six months. A person is in violation of the immigration laws if he or she does not depart the United States within the six-month limit, thereby becoming deportable and ineligible for other immigration law benefits such as a change or extension of status. Longer periods of overstay and "unlawful presence" can lead to a ban on subsequent re-entry that can last for up to 10 years.

But that rule has nothing to do with the person who makes frequent short visits that aggregate 180 days or more during the year. A person could theoretically come across (and depart) as a visitor every day and accumulate 365 days of presence in the United States without raising any concerns about overstay or unlawful presence. Such a pattern could certainly lead to more CBP scrutiny at the border as to the nature of the visits, to rule out the possibility that the person is working or living illegally in the United States. The same is true for the person seeking entry as a visitor for lengthy periods of weeks or months at a time. I have had people tell me that they are entitled to visit for up to six months, and I tell them they are not entitled to six minutes if CBP determines they are not a visitor. It is a strange paradox that a routine short-term visitor gets an admission for up to six months, but a person who seeks entry as a visitor for six months might not get admitted at all.

Immigration rule summary. Don't remain in the United States continuously for more than six months as a visitor. Aggregate time frames in excess of six months do not violate any immigration law, but they might create more CBP scrutiny at the border, requiring the person to prove how he or she qualifies as visitor. For the business visitor, this might require some advance planning and the implementation of record-keeping techniques that easily and credibly explain the number, nature, and duration of prior trips.

The second part of the "180-day rule" relates to U.S. taxes. Too much time in the United States can cause a Canadian visitor to be deemed a resident for U.S. federal income tax purposes, requiring that person to file a U.S. income tax return and report all worldwide income even if there is no earned income in the United States or any other activity that would require a U.S. tax filing. The Internal Revenue Service (IRS) uses a "substantial presence" test to determine if someone is a

resident for U.S. federal income tax purposes in a given calendar year. The "substantial presence" test is a mechanical formula based solely on the number of days on which an individual is present in the United States. The formula is applied to make a determination each calendar year. To be classified as a U.S. resident under the substantial presence test for a particular year, an individual must be physically present in the United States on at least 31 days of the current calendar year, and the sum of the following must equal 183 or more days: 1) all days in the United States in the current year, plus 2) one-third of the days in the immediately preceding year, plus 3) one-sixth of the days in the second preceding year.

The general rule of thumb is to keep presence in the United States under 120 days each year. (The designation "resident" for federal income tax purposes has nothing to do with immigration status or actual place of domicile; it just means that the person must file a U.S. resident return and report his or her worldwide income.) Thus, someone who consistently visits the United States for around 180 days a year is going to satisfy the substantial presence test and be deemed a U.S. resident for federal income tax purposes. That isn't the end of the analysis, however, because there are exceptions, including the "closer connection" and "tie-breaker" rules under the Internal Revenue Code and U.S.-Canada Tax Treaty that may allow the person to avoid being subject to U.S. tax on their worldwide income even if the actual number of days creates substantial presence. Notably, the closer connection exception is only available if the individual is present less than 183 days in the current year. In order to claim the application of one of these exceptions, the individual is required to affirmatively file a tax return or other information statement with the IRS. The closer connection exception is generally preferred because it does not require additional information filings with the IRS as does the treaty exception. Accordingly, most people try to limit their days of physical presence in the United States to 120 days or less per year to avoid any U.S. tax filing obligations or to less than 183 days so that he or she may claim the closer connection exception, if applicable.

Tax rule summary. A person will not be considered a resident for U.S. federal income tax purposes if he or she keeps the number of days in the United States to 120 days or less on a consistent basis. Individuals who do satisfy the substantial presence test may nevertheless still avoid residency status under the closer connection or treaty tie-breaker rules (though they do not avoid U.S. tax filings altogether).

In summary, it is a good rule of thumb to keep visits to less than 120 days annually. If that is not possible, the Canadian visitor should keep presence under 183 days so that he or she can elect the closer connection exception if otherwise applicable to the Canadian's situation. An over-simplistic approach might lead to unintended consequences or lost opportunities.