



THE IMPACT OF OBAMACARE ON GREEN CARD HOLDERS WHO RESIDE OUTSIDE THE UNITED STATES

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Unlike many, if not most countries, the long reach of Uncle Sam's tax laws extend far beyond geographic boundaries to affect citizens and lawful permanent residents (LPR) on an extraterritorial basis. Status not physical presence triggers the tax obligation. The need for LPRs living abroad to comply with US tax regimes is another example of how, since enactment of the Immigration Reform and Control Act of 1986, immigration has become increasingly and inextricably intertwined with all other aspects of American life and law. Beyond that, lawful permanent residence is not only a legal status but an economic one as well with tax implications that intimately affect the maintenance of such status and the fiscal consequences of its continued exercise. The impact of the individual health care mandate under the Affordable Care Act (ACA), also popularly known as Obamacare, upon LPRs who reside overseas is the most recent example of a growing tension between a domestically focused immigration policy and the increasingly global nature of both individual and national economic conduct in the global economy of the 21st century.

A number of LPRs, also known as green card holders, temporarily live outside the United States for a variety of legitimate reasons. In a globalized world, LPRs may more readily find employment assignments in other countries or they may need to be outside the United States to look after a sick relative. Essentially, an LPR must be returning from a temporary visit abroad under INA § 101(a)(27) in order to avoid a charge of abandonment. The term "temporary visit abroad" has been subject to interpretation by the Circuit Courts, and although the LPR may remain outside the United States for an extended period of time, the visit

may still be considered temporary so long as there is an intention to return. The Ninth Circuit's interpretation in *Singh v. Reno*, 113 F.3d 1512 (9th Cir. 1997) is generally followed:

A trip is a 'temporary visit abroad' if (a) it is for a relatively short period, fixed by some early event; or (b) the trip will terminate upon the occurrence of an event that has a reasonable possibility of occurring within a relatively short period of time." If as in (b) "the length of the visit is contingent upon the occurrence of an event and is not fixed in time and if the event does not occur within a relatively short period of time, the visit will be considered a "temporary visit abroad" only if the alien has a continuous, uninterrupted intention to return to the United States during the visit.

For a more extensive review on this subject, we refer you to our article, *Home Is Where The Card Is: How To Preserve Lawful Permanent Resident Status In A Global Economy*, 13 Bender's Immigration Bulletin 849, July 1, 2008.

With the deadline period for enrollment on March 31, 2014, a [number of non-citizens](#), including LPRs, are eligible for health care benefits under the ACA.

The ACA requires all "applicable individuals" including LPRs to maintain "minimum essential health coverage," and the failure to do so will result in a penalty when they file their federal income tax returns for year 2014 onwards. The "minimum essential coverage" is required on a monthly basis, but only during those months that qualify people as applicable individuals." On March 26, HHS released guidance which clarifies that many consumers who were unable to enroll through the marketplace before the March 31 deadline are eligible for a [special enrollment period](#) (SEP). The SEP gives qualifying consumers additional time to get health coverage without being assessed a penalty. To be eligible for the SEP, the consumer must have experienced one of the barriers identified in the guidance. These barriers include experiencing errors related to immigration status and being transferred between the marketplace and state Medicaid/CHIP agency. The additional time available to apply depends on the specific barrier and when it is resolved.

An LPR residing outside will need to purchase health insurance under the ACA. There are circumstances under which LPRs can still be deemed to be maintaining minimum essential coverage even when they are outside the United States if they meet the Internal Revenue Service test for shielding their foreign income from US taxation.

Under 26 CFR 1.5000A-1, “An individual is treated as having minimum essential coverage for a month—

(i) If the month occurs during any period described in section 911(d)(1)(A) or section 911(d)(1)(B) that is applicable to the individual”.

In turn, section 911(d)(1) provides:(d) **Definitions and special rules**
For purposes of this section—

(1) Qualified individual

The term “qualified individual” means an individual whose tax home is in a foreign country and who is—

(A) a citizen of the United States and establishes to the satisfaction of the Secretary that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, or

(B) a citizen or resident of the United States and who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days in such period.

Section 911 of the Internal Revenue Code allows certain US citizens and LPRs to shield their foreign income from US taxation by virtue of living outside the United States. The [foreign earned income exclusion](#) for 2013 is \$97, 600.

Since the full consequences of decisions on Obamacare will not become plainly evident until April 2015, any interpretations advanced now must be necessarily both preliminary and tentative, subject to modification if and when the IRS provides future guidance. It is this continuing involvement of the IRS, as well as the byzantine complexity of the ACA itself, that commends a healthy dose of modesty to all commentators. LPRs who are eligible to take the section 911 exemption because they are not physically present in the United States for a full 330 days within a 12 month consecutive month period are treated as having minimum coverage for that 12- month period. It is still not clear whether LPRs would have to elect to claim the foreign earned income exclusion by filing [Form 2555](#) with their tax returns so that they be deemed to have minimum essential coverage or whether the IRS will develop a special form for that purpose.

While it is true that only a US citizen can claim the bona fide resident of a foreign country exception, an LPR, if s/he is also tax resident in a county with which the US has an income tax treaty, can use the bona fide residence test

pursuant to the treaty's nondiscrimination provisions to also claim the foreign earned income exclusion. The bona fide residence test can be utilized even if the individual has not been physically present in the United States for 330 or more days. If that is the case, can a non US citizen of a treaty country also claim minimum coverage under the ACA?

For example, the [nondiscrimination provision of the US-India tax treaty](#), states in relevant part:

Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected. This provision shall apply to persons who are not residents of one or both of the Contracting States.

This language in the US-India tax treaty would seem to apply to the ACA health mandate exemption, since it is taxation or a requirement connected therewith. After all, the Supreme Court in [National Federation of Independent Businesses v. Sebelius](#), especially Chief Justice Roberts' opinion, upheld the constitutionality of the health mandate in the ACA by characterizing it as a tax. "The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax," according to Chief Justice Roberts. "Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness," the Chief Justice further opined. While the commerce power apparently has its distinct limits for the Roberts Court, the power to tax does not. For this reason, Solicitor General Donald Verelli, who suggested the possible utility of such reasoning to the Court, may turn out to have singular, if unexpected importance.

On the other hand, it could be argued that the ACA statutes refer only to section 911 and not to treaties. Also, the treaties define the scope of their application, which may have to be revised to include the ACA penalty. The US-India treaty, for example, applies to the following US taxes:

"In the United States, the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes), and the excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations (hereinafter

referred to as "United States tax")"

Therefore, unless the IRS provides more specific guidance, it is not clear at this time whether an LPR who takes the bona fide residence exception for purposes of shielding foreign income can also be deemed to have the minimum essential coverage.

LPRs who seek to claim a section 911 type foreign earned income exclusion to get out of the mandate under ACA should beware of adverse consequences on their LPR status. Living outside the United States for 330 days or more in itself could lead to a finding of abandonment if the LPR cannot successfully establish that his or her visit abroad was temporary under *Singh v. Reno, supra*. Even if LPRs assert that their trip abroad was temporary, claiming a section 911 benefit to avoid the health insurance coverage under Obamacare could bolster the government's charges that they abandoned their status. As we discussed in [The Taxman Cometh: When Taking a Foreign Earned Income Exclusion On Your Tax Return Can Hurt Your Ability To Naturalize](#), taking a section 911 exemption can also impair the applicant's ability to show that he or she did not disrupt continuity of residence during the relevant 5 or 3 year period. INA § 316(b) states that an absence from the United States of more than six months but less than one year during the 5-year period immediately preceding the filing of the application may break the continuity of such residence. Indeed, utilizing the bona fide residence exception, if it is allowed for LPRs under the ACA, would be more perilous than the physical presence exception as the individual must declare a residence in a foreign country. Another issue worth noting for people who claim bona fide residence under tax treaties is that they must file [Form 8833](#) to do so. Page 4 of the instructions to that form warns that this sort of bona fide residency claim for an LPR under a tax treaty triggers the exit tax for Long Term Residents (LTR):

If you are a dual-resident taxpayer and a long-term resident (LTR) and you are filing this form to be treated as a resident of a foreign country for purposes of claiming benefits under an applicable U.S. income tax treaty, you will be deemed to have terminated your U.S. residency status for federal income tax purposes. Because you are terminating your U.S. residency status, you may be subject to tax under section 877A and you must file Form 8854, Initial and Annual Expatriation Statement. You are an LTR if you were a lawful permanent resident of the United States in at least 8 of the last 15 tax years ending with the year your status as an LTR ends.

LPRs who live outside may wish to seek other ways to claim minimum essential coverage under the ACA if they do not wish to risk jeopardizing their green cards or their ability to naturalize in the future. For instance, LPRs who have health insurance provided by foreign insurers may qualify as having minimum essential coverage if the coverage is recognized by the Secretary of Health and Human Services. Coverage under group health plans provided through insurance regulated by a foreign government may also be recognized as minimum essential coverage, depending on specific circumstances and whether those plans have received U.S. approval. There are also the following [statutory exemptions](#):

Religious conscience. Membership of a religious sect that is recognized as conscientiously opposed to accepting any insurance benefits. The Social Security Administration administers the process for recognizing these sects according to the criteria in the law.

Health care sharing ministry. Membership of a recognized health care sharing ministry.

Indian tribes. (1) Membership of a [federally recognized Indian tribe](#) or (2) an individual eligible for services through an Indian care provider.

Income below the income tax return filing requirement. If the individual's income is below the minimum threshold for filing a tax return. To find out if you are required to file a federal tax return, use the IRS [Interactive Tax Assistant](#) (ITA).

Short coverage gap. Going without coverage for less than three consecutive months during the year.

Hardship. Suffering a [hardship](#) that makes one unable to obtain coverage, as defined in final regulations issued by the Department of Health and Human Services.

Affordability. Unable to afford coverage because the minimum amount the individual must pay for the premiums is more than eight percent of household income.

Incarceration. Being in a jail, prison, or similar penal institution or correctional facility after the disposition of charges against the individual.

Not lawfully present. Not being a U.S. citizen, a U.S. national or an alien

lawfully present in the United States.

LPRs can also avail of the short coverage gap exemption. In general, a gap in coverage that lasts less than three months qualifies as a short coverage gap. If an individual has more than one short coverage gap during a year, the short coverage gap exemption only applies to the first gap.

LPRs who fail to maintain the required minimum essential coverage must pay a penalty known as the "[individual shared responsibility payment](#)." In general, according to the IRS, the payment amount is either a percentage of your income or a flat dollar amount, whichever is greater. The individual will owe 1/12th of the annual payment for each month he or she (or dependents) do not have coverage and are not exempt. The annual payment amount for 2014 is the greater of:

1 percent of household income that is above the tax return threshold for the individual's filing status, such as Married Filing Jointly or single, or the family's flat dollar amount, which is \$95 per adult and \$47.50 per child, limited to a maximum of \$285.

The individual shared responsibility payment is capped at the cost of the national average premium for the bronze level health plan available through the [Marketplace](#) in 2014. The individual will make the payment when he or she files the 2014 federal income tax return in 2015.

For example, a single adult under age 65 with household income less than \$19,650 (but more than \$10,150) would pay the \$95 flat rate. However, a single adult under age 65 with household income greater than \$19,650 would pay an annual payment based on the 1 percent rate.

If an LPR chooses to pay the penalty instead of purchasing insurance, and fails to pay the penalty or delays in making the payment, this would need to be disclosed on an N-400 application relating to whether the applicant owes any taxes. This too could jeopardize the naturalization application, and would bring the penalty section of the ACA directly into the context of immigration issues. Furthermore, an LPR opting for the penalty over health insurance may create the impression, whether intentional or unintended, that he or she may not be maintaining ties with the US, further bolstering the government's charge of abandonment of LPR status.

The ACA is connected to immigration issues, and it behooves a careful practitioner to review the provisions of the ACA as they apply to non-citizens, and LPRs in particular. The interconnectedness of all these issues to the authors is the larger and more widely significant point, such as how seeking an exemption from the health insurance mandate can trigger potential loss of LPR status, invocation of the exit tax, or the ineligibility to become a US citizen in the future. No longer can any of these decisions be made in a vacuum without consideration of the broader consequences. The practice of immigration and tax law must invite the collaboration of experts from both disciplines.

Any consideration of the possible adverse consequences resulting from a decision to seek an exemption from the individual mandate imposed by the ACA must be informed by an understanding of the fact that an extended absence from the United States, without more, should never serve as the basis for involuntary abandonment of LPR status. We live in a global economy where international relocation is often the price for career advancement and even job retention. The law should and must provide that no LPR can be stripped of their "green card" on the basis of abandonment unless he or she clearly manifests or overtly states an intention to give it up. No inference from proven conduct can be possible absent compelling evidence that such was the desired and intended consequence. Application of this caution to the debate over Obamacare would properly reflect the profound importance of LPR status while also serving as a recognition of the enormous and continuing contributions that such permanent residents have made and continue to render to their adopted home.

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