

NATHO Travel Tax FAQ's – Traveler version

A major benefit of travel assignments for healthcare professionals is that they can qualify for tax free travel and housing benefits so long as they meet certain IRS requirements including maintaining a permanent tax home and working away from that home, among other things. Healthcare professionals who fail to follow these IRS guidelines put themselves at serious risk of incurring major tax liabilities as well as other penalty and interest charges. This document is designed to provide healthcare professionals with general guidance on the nature of the IRS guidelines and how to remain in compliance.

Disclaimer – The reader is advised that the following discussion is general in nature and should not be considered advice for any specific tax situation. As such, NATHO hereby disclaims all warranties, expressed or implied. Given the unique circumstances of each traveler's tax situation, the reader should consult with a tax attorney, CPA, and/or other tax planning professional for any specific guidance rather than relying solely on the discussion herein. Moreover, changes are made periodically to the tax laws, administrative rules, tax releases, tax rates and other materials, which may or may not be fully incorporated into the discussion below. Also, any general tax advice provided in the discussion below is not intended to be used and cannot be used, by the reader for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.

1. How does the IRS define a permanent tax home?

A tax home is the taxpayer's regular place of business, regardless of where the taxpayer maintains a family home. It includes the entire city or general area in which the work is performed. If the taxpayer has more than one regular place of business, the tax home is the main place of business taking into account time spent, level of business activity, and the significance of the associated income. In most cases, travelers will not have a main place of business and their tax homes would then be the place where they regularly live. At this point, a traveler would need to consider the following three factors to determine whether a claimed tax home away from the regular place of business truly qualifies for that status:

- a. Does the traveler perform a portion of his/her business in the vicinity of the home and use that home for lodging while doing business in the area? Many travelers will not meet this requirement, as they do not have regular work in the tax home area.
- b. Does the traveler have living expenses (mortgage, rent, utilities, etc.) at the claimed permanent tax home that are duplicated while the traveler is on assignment away from home? In general, the duplicated expense to maintain a tax home should exceed \$250 per month and reasonably reflect a fair market basis for similar accommodations in the geographical area.
- c. Has the traveler either a.) not abandoned the area in which both the historical place of lodging and the claimed main home are located; b.) has a member or members of the family living at the main home; or C.) uses the home frequently for the traveler's own lodging needs? On this last point, there is limited IRS guidance, but the return trips should be more than a few times per year and one or more of the trips should be much longer than a long weekend.

If the traveler satisfies all three factors, the traveler definitely has a permanent tax home. If the traveler satisfies only one or no factors, the traveler is considered an itinerant worker and the tax home is wherever the traveler is working. As an itinerant worker, the traveler cannot claim a travel expense deduction because the traveler is never considered to be traveling away from home.

If a traveler satisfies only two factors, the traveler may have a tax home depending on all the facts and circumstances. Listed below are relevant facts and circumstances to consider. In general, a traveler would need to satisfy a majority of these in order to have a permanent tax home:

- The tax home address is the address of record for filing income tax.
- The tax home has phone service or is the traveler's primary mailing address.
- License plates and driver's license are registered in the tax home city.
- The tax home address is the address of record for the traveler's professional license.
- The primary banking relationship is in the vicinity of the tax home.
- The traveler is registered to vote in the tax home precinct.
- The traveler belongs to a church, club, or other associations in the tax home vicinity.

2. How often can a permanent tax home be changed?

There is no limit to how many times it can be changed as long as all of the requirements to have a permanent tax home are met.

3. Is it true that travelers working at one location for a year or more no longer qualify for tax free per diems, or other tax free benefits such as airfare, rental cars, travel reimbursements, company paid housing, etc?

Yes. Once a traveler has worked in a single location away from his/her home for a year, the traveler is no longer eligible for tax free per diems or tax free travel and housing benefits. To be clear, the traveler can still receive these benefits, but such benefits would be considered income and, therefore, taxable. The IRS considers away from home to mean that the traveler must be far enough from home that he/she could not go home, rest, and return to work the following day.

4. When do the per diems and other company benefits become taxable for travelers who are going to work more than a year in one location?

The per diems and other company benefits become taxable as soon as it is known that the traveler will be working a year or more in a single geographical location. In other words, as soon as a traveler signs a confirmation that would have the effect of taking the assignment beyond 52 weeks, the benefits and/or per diems become taxable immediately. Working in multiple facilities within commuting distance of each other still counts as a single geographic location. As an example, a nurse has been working away from home at various facilities in Los Angeles for 37 weeks. When she completes her current assignment, she will have worked in Los Angeles for a total of 39 consecutive weeks. On week 37, she signs an agreement to extend her assignment 14 more weeks, putting her over one year worked in Los Angeles. All of her travel and housing benefits and per diems become taxable on week 37 when she agreed that she would be working beyond one year.

5. How long does a traveler have to go home or be away from an assignment location to reset the clock for tax free per diems and other travel related benefits?

The IRS has ruled that 3 weeks is never long enough to reset the clock for tax free travel benefits whereas seven months is always long enough. Unfortunately, the IRS has provided no guidance for breaks in between these two extremes. Considering that travel assignments typically lasts 13 weeks, a 13 week break from the local geographic area should be sufficient to reset the clock. The traveler could either return home or take another travel assignment in a different geographic area. If the traveler then returned

back to the same local geographic area where the traveler was working immediately prior to the break, the break would more than likely need to be even longer than 13 weeks. The reason for this would be that there should be no written or oral understanding during this break period about returning to the same assignment area where the traveler was working immediately prior to the break. Finally, the 13 week break must be continuous. Multiple breaks totaling 13 weeks or more won't work.

6. So long as a traveler works less than one year at any single location, is it true that the traveler can qualify for tax free per diems or other tax free benefits beyond a single year?

Yes, a traveler can qualify for tax free per diems by working in multiple geographic locations so long as the traveler continues to maintain a permanent tax home. As a part of maintaining a permanent tax home, the traveler needs to periodically return home. IRS guidance on how frequently a traveler should return home and how long she should remain there is not clear. Based on case law, a traveler should return home several times per year and should return for a more extended stay at least once every 30 months, and ensure they are still actually maintaining a permanent tax home as per IRS guidelines during the entire time they are traveling. It is the traveler's responsibility to inform the agency as to her/his tax status by declaring that he/she has not and will not be working more than 30 months away from home in multiple geographic locations or in any one of these locations more than 12 consecutive months without an extended stay return visit to her/his permanent tax home. Simply switching agencies does not reset the clock. As far as the length of that extended stay return visit, the IRS has ruled that 3 weeks is never long enough to reset the clock for tax free travel benefits and seven months is always long enough. Unfortunately, the IRS has provided no guidance for breaks in between these two extremes. While the traveler would not be required to work at home during this return visit, doing so would certainly reinforce the traveler's permanent tax home status. Considering that travel assignments typically last 13 weeks, a 13 week return home would represent a clear break from traveling so long as there was no written or oral understanding during this break period about returning to the same assignment area where the traveler was working immediately prior to the break. Additionally, the 13 week return home must be continuous. Multiple breaks totaling 13 weeks or more won't work. Of course, if a traveler worked in multiple facilities within commuting distance of each other, all of those assignments would still only count as a single geographic location and the traveler would be limited to tax free travel benefits for only one year.

7. How far does a traveler need to live from a facility to qualify for tax free per diems or other tax free benefits? Should it be based on distance or commute time? Also, should the length of the shift be taken into account?

The IRS has not provided clear guidance in this area, except that a traveler needs to be far enough from his/her permanent tax home so that it would be unreasonable to go home, rest and return to work the next day. In considering what is unreasonable, the IRS looks at individual facts and circumstances, paying close attention to travel time, the actual distance and the traveler's intentions. Generally speaking, the IRS tends to give more weight to the travel time and the traveler's intentions vs. the actual distance. Not surprisingly, while there is a minimum 50 mile limit for moving expenses to be tax deductible when a taxpayer changes jobs, there is no connection between this rule and the minimum distance a worksite has to be from the taxpayer's home in order for the taxpayer to be considered away from home and therefore eligible for tax free travel and housing benefits. For example, if a traveler lives 50 miles from the worksite location and is only working 8 hour shifts, there should be more than sufficient time to go home, rest, and return to work the next day. By the same token, if a traveler lives 100 miles from the worksite location and is working 12 hour shifts, there is probably not enough time to go home, rest, and return to work the next day, even under ideal circumstances. Having

said all this, since the IRS requires that a traveler be “duplicating lodging expenses to qualify for tax free per diems and other benefits, if a traveler is commuting from his/her permanent residence for every shift without spending any money on additional lodging, these benefits are taxable no matter how far the commute is because it’s clearly reasonable enough for the traveler to actually do it.

8. Can per diem rates for a traveler be based on the number of hours worked per week?

No. Per diem rates based on hours worked make per diems look like compensation and could likely be viewed by the IRS as wage recharacterization. By contrast, while an agency should not modify the per diem rate, it could reduce or increase the number of days worth of per diems provided based on the number of days actually worked by a traveler. In summary, per diems should never be paid hourly, but instead should be paid daily.

9. When offering tax free per diems, should there be a minimum wage rate? What is a reasonable wage rate?

Yes there should be minimum wage rate when offering per diems and it should be a reasonable hourly rate of pay that would represent fair market value compensation for that occupation. So, even if the employee were to receive no travel or housing benefit or per diems, the rate of pay by itself would be acceptable to the employee or most other people in the same occupation working on a full time basis.

10. If two travelers (both with a permanent tax residence) working away from home share an apartment and the company pays one of them a housing per diem, should the housing per diem be taxed?

Yes. If the company is providing the free apartment to the two travelers, they have clear knowledge that neither traveler is actually incurring duplicate lodging expenses while away from home. Therefore, any stipend paid must be taxed. At the same time, the agency could pay a tax free meals and incidental per diem since the travelers are still incurring meals and incidental expenses even though they are living in a company apartment. In a situation where the travelers made their own housing arrangements, the staffing agency would be obligated to tax housing per diems for the second traveler if anyone at the agency knew or had good reason to believe that the two travelers were living together.

11. How much are penalties and interest if the IRS determines that per diems or other travel benefits should have been taxable?

Generally speaking, penalties are expressed as a percentage of the unpaid tax liability. If an audit determines that reimbursements received by a traveler should be included as taxable wages rather than non-taxable per diems, the IRS will charge interest, from the due date of the return, based on the federal short term interest rate plus 3 points. In addition to interest, penalties can also be applied. Penalties include charges for not paying on time, failure to file on time, accuracy, negligence and understatement of tax. Interest applies to penalties as well. The combination of penalties and interest can double the tax bill in a relatively short time. In addition, states and other jurisdictions may have penalty provisions that are more onerous than those of the IRS. Since the recession began, tax revenues have been lower than expected in many jurisdictions, and many of these tax jurisdictions are looking for ways to balance their budgets. We have seen many state and local jurisdictions, becoming more aggressive when comes to interest and penalties for underpayments of tax. It would not be unusual to see penalties and interest that amount to 2-3 times the amount of unpaid tax at the state and local level in addition to whatever the IRS would assess.

12. Is there ever a circumstance where a staffing agency could pay a nurse as an independent contractor?

This would be extremely difficult. In the eyes of the IRS, an independent contractor must be someone who has substantial direction and control over how and when he/she completes his/her work. The general problem with such an arrangement is that a nurse working in a hospital setting is far from independent. The hospital determines the hours worked, when breaks are taken, and there is a manager and physicians at the hospital supervising the nurse's delivery of patient care. Nurses are not allowed to make decisions outside of their scope of practice, but must advise the attending physician instead. Beyond these challenges, most client contracts require the staffing agency to carry professional liability and workers compensation insurance covering all of its healthcare workers, which means the nurse could not be an independent contractor. Likewise, most allied health professional also do not qualify to be paid as independent contractors. In addition, the Joint Commission is now scrutinizing agencies that pay contractors on 1099's vs. W-2s and will not certify those that are classifying workers as independent contractors who should actually be W2 employees.

13. What should I do if I find a staffing company abusing or ignoring the IRS guidelines in this area?

If the staffing agency is a member of the National Association of Travel Healthcare Organizations (NATHO), call NATHO and provide them with a written complaint and any documentation which may support that concern. Every NATHO member has agreed to abide by a Code of Ethics and abusing or ignoring IRS guidelines would represent a breach of these guidelines. If a member company is accused of abusing or ignoring those guidelines, it needs to be able to show that the accusation is false. Alternatively, it's also possible that the company made a mistake or series of mistakes in good faith. In such instances, NATHO would work with the company to provide educational assistance to help the company get into compliance as quickly as possible. If the evidence shows that the accusations are valid and that the company willfully abused or ignored the guidelines, the company would need to immediately correct the problem or it would face sanctions including, but not limited to reprimand, probation, suspension or expulsion from NATHO.