

# Advice for Cross Border Travelers - Tips for Snowbirds

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## Who are Snowbirds?

“Snowbirds” are Canadian citizens / residents who flock annually to warmer US climates to avoid Canadian winter weather. By most estimates, as many as 500,000 Canadian citizens / residents make the journey south each year.

Indeed, Snowbirds make up one of the largest investor groups in US residential properties, accounting for 19 percent of all foreign home purchasers in the US and contributing over seven billion (\$7,000,000,000 USD) in real estate purchases in 2017. It is also true that most individuals who are “illegal aliens” entered the US through legal means but have over-stayed due to mistake or otherwise.

Through this and other MGTL blogs to come, we hope to dispel some of the most common misconceptions among Snowbirds. Specifically, this blog will highlight the different perspectives between US immigration and tax law for Snowbirds to keep in mind as they spend time in the US.

## Immigration Perspective: How long may Snowbirds be in the US each year?

Many Snowbirds are under the impression that they are only permitted to remain in the US a total of six months or 183 days per year.

From an immigration perspective, there are two controlling concepts to keep in mind:

1. Generally, Canadian citizens and permanent residents are granted up to six months per stay; and
2. Each entry to the US is in the authoritative discretion of US Customs and Border Protection (“CBP”).

Although persons entering the US in B-2, Visitor for Pleasure Nonimmigrant Status, as is true of most Snowbirds, may be granted up to six months of stay when entering the US, there is no specific limit on how many days or months an individual could be in B-2 status in the US on an annual basis. For example, if a person enters the US on January 1, 2019, is granted six months of stay by CBP, and leaves the US by the end of June, there is no specific regulatory provision that would keep CBP from granting an additional six months of B-2 status to the individual upon a subsequent entry to the US a few weeks later.

Prime examples of individuals in B-2 status for more than six months per year includes cohabiting partners, extended family members, and other household members of another alien in long-term nonimmigrant status, but who are not eligible for derivative status under that alien’s visa classification. These individuals are often granted B-2 status for up to a year period by CBP at the port-of entry and are eligible to extend their B-2 status, assuming they are eligible to evidence their ties to home country.

## Tax Perspective: How long may Snowbirds be in the US each year?

Unlike the US immigration rules, US tax law doesn't mandate the length of time a Snowbird can legally stay in the country. Tax residency and the requirement to file US tax returns are based on whether the Snowbird meets the "substantial presence test". This test applies if the Snowbird has spent at least 31 days in the US during the calendar year. The Snowbird will generally be considered to be substantially present and a tax resident if a special formula results in 183 days or more over a rolling three-year period. In this formula, days of presence in the second preceding year count for one-sixth; days in the preceding year count for one-third; and days in the current year count fully. As a practical matter, to know the total days for the "current" year usually requires counting those days with hindsight after the "current" year has ended on December 31. Importantly, presence in the US during any portion of a day, no matter how brief, generally counts as a day of presence. One exception that can come into play for Snowbirds is for presence at a US airport merely for a connecting flight with a destination outside the US

There is an exception to substantial presence that often applies to Snowbirds who are not present in the current year for more than 182 days and who maintain a closer connection to Canada. Unlike the treaty tie-breaker rules discussed below, the closer connection exception is provided by US domestic tax law itself and requires a tax home outside the US (i.e., Canada), such as a regular place of business or regular place of abode in a real and substantial sense. Other important factors include where you spend the majority of your time, where your belongings are located, business and social connections, the residence of immediate family members, investment and bank accounts, driver's license, voting history, etc. To claim the closer connection exception, the Snowbird must file Form 8840, Closer Connection Exception Statement for Aliens, with the IRS. The form is generally due by June 15 of the following calendar year for which it is reporting. Although there are certain categories of individuals, i.e., students, who are exempt from the substantial presence test, it is unlikely that a Snowbird would fit into any of these categories.

If the Snowbird spends 183 days or more in the current year in the US, the closer connection exception is not available. However, the so-called tie-breaker rules of the Canada-US Tax Treaty – contained in Article IV:2 – may prevent that Snowbird from being treated as a US tax resident. The Snowbird will continue to be considered a Canadian tax resident as long as he or she has a permanent home available in Canada but not the US. If the Snowbird has a permanent home in both countries and the centre of vital interests remains in Canada, the Snowbird's tax residence will continue to be Canada. The centre of vital interests means a preponderance of the "building blocks of life" similar to the factors mentioned above used to determine a closer connection. If that factor is inconclusive and the Snowbird has a habitual abode in both countries, citizenship will break the tie. To invoke the protection of the Tax Treaty, the Snowbird must file with the IRS Form 1040NR, and attach to it Form 8833, the form for disclosing a treaty-based return position. The tax return is generally due by June 15 of the following calendar year (with an extension to October 15 available).

While Canadians enjoy certain privileges regarding admission to the US, Snowbirds should be aware of the immigration and tax requirements and implications of their annual travel to the US and work with immigration and tax professionals to develop strategic planning to address their specific needs.

Our next Snowbird blog will highlight the impact of US tax reform enacted in late 2017 on various forms of ownership of vacation or rental properties.