

The most current information on how Payroll professionals can avoid legal and procedural pitfalls, in a fast-read format, twice a month.

KEEP UP TO DATE **on** PAYROLL™

March 15, 2023

UPCOMING DEADLINES

Use this checklist to help ensure your deposits of Social Security, Medicare and withheld income taxes are timely remitted to the IRS.

■ SEMIWEEKLY DEPOSITORS

- **March 22, 2023:** Deposit taxes for payroll on March 15, 16, 17.
- **March 24, 2023:** Deposit taxes for payroll on March 18, 19, 20, 21.
- **March 29, 2023:** Deposit taxes for payroll on March 22, 23, 24.
- **March 31, 2023:** Deposit taxes for payroll on March 25, 26, 27, 28.
- **April 5, 2023:** Deposit taxes for payroll on March 29, 30, 31.
- **April 7, 2023:** Deposit taxes for payroll on April 1, 2, 3, 4.
- **April 12, 2023:** Deposit taxes for payroll on April 5, 6, 7.
- **April 14, 2023:** Deposit taxes for payroll on April 8, 9, 10, 11.

■ MONTHLY DEPOSITORS

- **April 18, 2023:** Deposit taxes for payments made during March 2023.
- **May 15, 2023:** Deposit taxes for payments made during April 2023.

■ ALL EMPLOYERS

- **May 1, 2023:** File Form 941 for Q1. Note: If you properly deposited taxes on time and in full, you have until May 10, 2023, to file.

Miscalculation of intermittent, reduced schedule FMLA leave?

■ New opinion letter provides insight for employers

It's been a couple years since the Dept. of Labor (DOL) issued an opinion letter, but the agency is back at it.

The latest opinion letter, released Feb. 9, 2023, shed light on the Family and Medical Leave Act (FMLA). More specifically, FMLA 2023-1-A addressed one employer's situation involving:

- how intermittent or reduced schedule FMLA leave should be calculated, and
- whether employees' schedule limitations would be "better suited" as a reasonable accommodation under the Americans with Disabilities Act (ADA).

Multiple employees at the company asked to limit their workdays to eight

hours per day due to their chronic, serious health conditions, and they'd been approved for reduced schedule FMLA leave. The challenging part for the company was it typically scheduled shifts longer than eight hours, given its need for 24-hour coverage.

What FMLA 2023-1-A said

As the opinion letter pointed out, the employer incorrectly assumed an employee's annual 12 workweeks of FMLA leave would convert to 480 hours when calculating intermittent or reduced schedule leave.

While 480 hours would be accurate for someone who's regularly scheduled to work 40 hours per week, someone

(Please see FMLA leave ... on Page 2)

Say goodbye to these IRS forms and publications

Some of the forms and publications you've relied on in the past won't be available much longer.

That's what the IRS said in the final version of *Instructions for Form 941*. Here's what's changing:

What to use instead

Two forms will be discontinued after the fourth quarter of 2023.

One is Form 941-SS, used by employers in American Samoa, Guam, the Commonwealth of the Northern Mariana Islands and the U.S. Virgin Islands. The other is Form 941-PR, used by employers in Puerto Rico.

Instead, you'll use Form 941 or the Spanish version of the form.

The following publications will be gone after 2023 and instead you'll use Publication 15, *Employer's Tax Guide*, or a yet-to-be-created Spanish version:

- Publication 51, *Agricultural Employer's Tax Guide*
- Publication 80, *Federal Tax Guide for Employers in the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands*, and
- Publication 179, *Federal Tax Guide for Employers in Puerto Rico*.

More info: www.irs.gov/form941

Adult care provider didn't combine all hours worked per pay period

■ INVESTIGATION OF CA EMPLOYER SHOWED REPEAT FLSA VIOLATIONS

When the Dept. of Labor (DOL) showed up for a second investigation of a California adult care provider, the federal agency once again discovered Fair Labor Standards Act (FLSA) violations.

The prior investigation several years ago turned up minimum wage and overtime infractions.

This time, the DOL found that the Garden Grove, CA, employer failed to combine all hours worked and then, to hide that fact, paid employees using multiple paychecks per pay period.

Neldy's R.C. Inc., operating as Neldy's Adult Residential Care Home, also deducted meal breaks from employee's wages. Problem was, they weren't completely relieved of their duties during these breaks.

Plus, the employer didn't keep the

accurate time and payroll records as required by the FLSA.

Because the violations were willful, Neldy's R.C. Inc. had to pay \$25,000 in civil money penalties. That was in addition to owing 108 employees \$345,348 in back wages and an equal amount in liquidated damages.

Plus, under terms of a court order, the business can't violate the FLSA again at any of its 12 locations.

DOL's focus on healthcare industry

In the healthcare industry, FLSA violations are common, according to the DOL.

For example, in FY 2021, the DOL recovered \$13.8 million in back wages due to 17,000 workers in the industry.

More info: www.dol.gov/newsroom/releases/whd/wbd20230110-2

FMLA leave ...

(continued from Page 1)

whose normal workweek is, say, 50 hours would be entitled to 600 hours of leave.

FMLA 2023-1-A further advised the employer: Unless eligible employees exhaust their hours of available leave, their reduced schedule leave wouldn't reach a cut-off point. Indeed, it could continue year after year.

As for which law – the FMLA or the ADA – better applied to the employees' needs, the DOL explained the two laws don't cancel each other out. Rather, these laws along with all other applicable federal and state laws should be taken into consideration to determine what best benefits the employee. In fact, someone may be covered by both the FMLA and the ADA simultaneously.

Another important reminder: A "disability" under the ADA and a "serious health condition" under the FMLA are two different concepts. As such, they must be analyzed separately.

More info: bit.ly/fmla664

COMPLIANCE CHECK

■ HOURS MISTAKE: MINORS STAYED AT WORK TOO LONG

Syl's Restaurant and Lounge, a Joliet, IL, restaurant and catering company, violated federal child labor laws on hours worked. The restaurant's minor-aged bussers, runners and dishwashers stayed at work later than 7 p.m. on school nights and 9 p.m. on weekends. Some worked more than 18 hours per week. In addition, the company didn't follow the overtime provisions of the Fair Labor Standards Act.

- \$2,671 in back wages, and
- \$18,350 in civil money penalties.

More info: bit.ly/restaurant664

■ IMPROPER DEDUCTIONS FROM H-2B WORKERS' PAY

Grandview Landscaping Inc., a Denver landscaping company, failed to pay the proper amount of overtime to 14 workers – 10 of whom had H-2B worker visas. The employer made illegal deductions from their wages for transportation to and from worksites. Also, the company didn't keep the proper records, in violation of the Fair Labor Standards Act.

- \$203,332 in back wages, and
- \$111,609 in civil money penalties.

More info: bit.ly/landscaping664

■ \$50K OWED FOR UNPAID PRE- AND POST-SHIFT WORK

Queen Emma Preschool, a Honolulu preschool, failed to pay some employees for all hours worked as per the Fair Labor Standards Act. Example: Preschool aides weren't paid for time worked before or after their shifts when parents dropped children off early or picked them up late. That led to recordkeeping violations, too.

- \$24,893 in back wages
- \$24,893 liquidated damages, and
- \$4,936 in civil money penalties.

More info: bit.ly/preschool664

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Supreme Court decision on OT and highly compensated employee

■ HE EARNED OVER \$200K PER YEAR BUT WASN'T PAID ON SALARY BASIS

No matter how much an employee earns – even if it's \$200K or more per year – that person may not be exempt from overtime.

That's what the U.S. Supreme Court said in *Helix Energy Solutions Group Inc. v. Hewitt* on Feb. 22, 2023.

When the employee in question worked on board an offshore oil rig, he typically put in about 84 hours per week, but he didn't receive any overtime pay.

That's because the company had classified him as an executive who was exempt from the overtime requirements of the Fair Labor Standards Act (FLSA).

He was paid a daily rate of \$963 or more. That added up to over \$200K per year, well above the threshold to be a highly compensated employee (HCE). But the company made a crucial mistake: He wasn't paid on a salary basis.

Who's executive exempt?

The High Court looked at two rules for classifying someone as executive exempt. They are the:

- general rule – requiring the employee to pass the salary basis test, the salary level test (currently that's \$684 per week) and the duties test, and
- HCE rule – requiring the employee to pass the salary basis test, the salary level test (\$107,432 per year) and a relaxed duties test.

Under either rule, an employer has to pay an employee on a salary basis – i.e., a predetermined and fixed salary that doesn't vary with the amount of time worked.

When someone is paid on a daily basis, that person's weekly pay is a function of how many days he or she worked that week. That's not paying someone on a salary basis, the Supreme Court made clear in *Hewitt*.

In certain situations, an employer may be able to pay someone on an hourly, shift or daily basis and still pass the salary basis test. That is, if the employer also guarantees a weekly payment approximating what the employee usually earns.

That didn't pertain to the employer in the case, though, so overtime should have been paid, the court said.

More info: www.supremecourt.gov/opinions/22pdf/21-984_j426.pdf

Form I-9 & E-Verify: Look for 2 redesigned documents

Two documents employees can give you for Form I-9 and E-Verify purposes have been updated.

They are Permanent Resident Cards – aka Green Cards – and Employment Authorization Documents (EADs).

Redesigns like this occur every three to five years and are intended to improve security, says U.S. Citizenship and Immigration Services (USCIS).

Here are just a few of the changes that have been made, according to USCIS: enhanced optically variable ink; highly secure holographic images on the front and back of the cards;

and data fields displayed in different places than on previous versions.

Current cards still valid

While USCIS began issuing the redesigned documents on Jan. 30, 2023, some Green Cards and EADs issued after that date may display the current design format until the current supply of cardstock is used up.

Plus, current cards remain valid until the expiration dates printed on the cards or indicated on accompanying Forms I-797, *Notice of Action*.

More info: bit.ly/documents664

NEWS YOU CAN USE

■ Q2 INTEREST RATES WON'T CHANGE, SAYS THE IRS

According to IRS Revenue Ruling 2023-4, interest rates will remain the same for the second quarter of 2023. They are:

- 7% for overpayments and 6% for corporations
- 4.5% for the portion of an overpayment exceeding \$10,000
- 7% for underpayments, and
- 9% for large corporate underpayments.

More info: www.irs.gov/pub/irs-drop/rr-23-04.pdf

■ NEW RULE ON WAGES FOR TEMPORARY AG WORKERS

The Dept. of Labor's Employment and Training Administration issued a final rule revising the methodology for Adverse Effect Wage Rates (AEWRs). The change affects employers that hire workers with H-2A visas to temporarily work in non-range occupations.

The final rule also states that if an employee's job involves a combination of Standard Occupational Classification (SOC) codes, the employer is obligated to pay whichever SOC code has the highest AEWR.

More info: *Federal Register*, 2/28/23.

■ DEFERRED SOCIAL SECURITY TAX WITH BALANCE DUE?

During its March Payroll Industry Call, the IRS discussed the now-past deadlines for paying deferred Social Security tax.

Specifically, the IRS addressed what third-party payers, such as certified professional employer organizations, should do if an employer has a balance due.

The third-party payer should notify the IRS by FAX and relay certain information – e.g., Schedule R (Form 941).

More info: bit.ly/deferredtax664

Any unnecessary tasks, practices or systems in the Payroll department?

■ UTILIZING 'DOWNTIME' TO IDENTIFY AND ELIMINATE WASTE

Companies looking to enhance operational excellence will spend some time identifying waste. Like any other department, Payroll can benefit from taking this step.

Bear in mind, some waste is necessary, and the best you can do is minimize it. But if you find unnecessary waste, of course the goal would be to eliminate that.

One Payroll manager whose company had set aside time to focus on operational excellence considered how he might be able to improve the functionality of his department.

Andrew Berding, payroll manager at ProAmpac in Cincinnati, OH, used the acronym "DOWNTIME," taught during his company's recent training, to accomplish that.

Recently, he shared with *KUDP* what it looks like to walk through the steps:

Aiming for improvement

D – defects. Is there anything that leads us to reworking or reprocessing?

We check for templates uploaded with bad file numbers or wrong employee identification numbers.

O – overproduction. How frequent are our transactions with vendors? We look for ways to safely reduce some exchanges, maybe from multiple times per week to once, Berding explained.

W – waiting. When do we send or upload information and then wait for it to come back or be approved? We line up other projects we can make progress on in the meantime.

N – not utilizing people. What are the points of inactivity for each person in our department? We aim to manage team members' time as best we can.

T – transportation. How often during a process does responsibility change hands? We reassess our levels of approval and consider whether the flow of work makes the most sense.

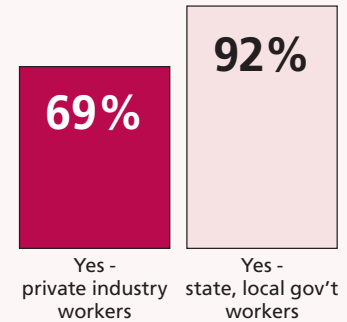
I – inventory. Do we have too many different types of templates, are any training guides out of date or are any items on our shared drive no longer used? Then, clean-up is needed.

M – motion. In what folders are we saving our computer files? If we

WHAT PAYROLL PROS TOLD US

Retirement plans

Do you have access to an employer-provided retirement plan?



Source: Bureau of Labor Statistics, The Economics Daily, 2/1/23

As Bureau of Labor Statistics data shows, in 2022, more workers in state and local government (92%) than in private industry (69%) had access to employer-provided retirement plans.

Each issue of *KUDP* contains an exclusive survey to give Payroll pros insight into what their peers nationwide are thinking and doing.

end up continually moving or saving files to different folders or have too many layers of folders, those are some reasons to reorganize, Berding noted.

E – excess processing. Are we doing too much auditing manually? We consider what steps or reports can be automated – and we set schedules to ensure we're streamlined.

REAL-LIFE SCENARIO: DID THEY GET IT RIGHT?

Third-party payroll software not available due to ransomware attack

A healthcare management company in Iowa faced this real-life scenario:

The company used third-party software for timekeeping and payroll processing. The software became unavailable – for what turned out to be six weeks – after the third-party software provider experienced a ransomware attack.

In response, the healthcare company gave employees timesheets so they could track their time manually.

Just before the software outage, one employee, who'd been a PT licensed practical nurse earning \$26.29 per hour plus a shift differential for

weekend work, got promoted to a FT minimum data set coordinator. Her pay also increased to \$29 per hour.

For her and other employees paid on the same biweekly pay cycle, the company issued three paychecks during the software ordeal.

When processing that first check, the company used timesheets to gather number of hours worked. But it used pay rates from the prior pay period. Given the employee's recent raise, her straight time rate was wrong, as was the rate for her 5.2 hours of OT.

Another Fair Labor Standards Act problem: After the software became

operational again, the company aggregated the three pay periods to determine if employees had been underpaid or overpaid.

The employee asked a court if it'd conditionally certify a collective action against the healthcare management company, and the court agreed.

Checklist for compliance

- Having a contingency plan in place in the event of a cyberattack is critical for Payroll.
- Falling back on paper timesheets is an option, but using Excel could provide more automation.

Tracking local laws and regs

■ New Mexico cities announce 2023 minimum wage rates

In Albuquerque, NM, as of Jan. 1, 2023, the minimum wage rate is \$12 per hour. That's up from \$11.50. That means the city's minimum wage rate is the same as the state's rate again this year.

But in two other New Mexico cities, the rates exceed the state's rate. As of March 1, 2023:

- Santa Fe employers need to pay at least \$14.03 per hour (up from \$12.95) under the living wage ordinance, and
- the living wage rate in Santa Fe County is \$13.73 per hour (an increase from \$12.95).

More info: www.dws.state.nm.us/Minimum-Wage-Information

■ COVID-19 state of emergency has ended in many CA localities

California set Feb. 28, 2023, as the end of its COVID-19 state of emergency (please see p. 6). Many

localities said they were doing the same on or around that date.

Some of the counties terminating their states of emergency on Feb. 28, 2023, are Alameda, San Diego, San Francisco, San Mateo, Solano and Sonoma.

More info: bit.ly/california664

■ In these NY spots, no changes to minimum wage, salary threshold

Certain areas in New York have a higher minimum wage and salary threshold for who's exempt from overtime than the state does (please see p. 6).

The minimum wage is \$15 per hour in New York City, Long Island and Westchester County – unchanged from previous years.

Similarly, the salary threshold in those jurisdictions is unchanged at \$1,125 per week.

More info: www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage

Answers to readers' most pressing Payroll questions

Whether you're a longtime Payroll person or new to the profession, no doubt you occasionally face situations that leave you scratching your head. Here, we answer common dilemmas:

New hire reporting: Who's a 'newly hired employee'?

Q: Does our company need to submit a new hire report for an employee who's been on an extended leave of absence?

A: It's no surprise that the phrase "newly hired employee" includes an individual who hasn't been employed by your company in the past. But Payroll practitioners know the requirements for new hire reporting go beyond that. Someone who was previously

employed by your company and has been separated from that employment for at least 60 consecutive days is also considered newly hired. As the Office of Child Support Enforcement explains in its FAQs – updated Dec. 21, 2022 – an employee who hasn't been formally terminated or removed from the payroll records wouldn't need to be reported to the state agency. That'd include someone who's returning from an extended leave of absence.

More info: www.acf.hhs.gov/css/faq/new-hire-reporting-answers-employer-questions

Send questions to jweiss@HRMorning.com. Because of the volume of mail we receive, we regret we can't answer all submissions.

IRS FORMS ALERT

RECENT CHANGES TO FEDERAL FORMS AND PUBLICATIONS

This list of payroll-related publications contains updates.

- Form 7207, *Advanced Manufacturing Production Credit*. Revised January 2023. Posted 2/1/23.
- *Instructions for Form 7207*. Revised January 2023. Posted 2/1/23.
- *Instructions for Form 6765*. Revised January 2023. Posted 2/6/23.
- *Instructions for Form 720*. Revised March 2023. Posted 2/8/23.
- Publication 5084, *Congressional Update*. Revised February 2023. Posted 2/9/23.
- Form 720, *Quarterly Federal Excise Tax Return*. Revised March 2023. Posted 2/16/23.
- Publication 5743, *Tax Compliance Burden Report for 2018*. Revised February 2023. Posted 2/16/23.
- *Instructions for Form 944-X*. Revised February 2023. Posted 2/21/23.
- Form 944-X, *Adjusted Employer's ANNUAL Federal Tax Return or Claim for Refund*. Revised February 2023. Posted 2/21/23.
- *Instructions for Form 943-X*. Revised February 2023. Posted 2/22/23.
- Form 943-X, *Adjusted Employer's Annual Federal Tax Return for Agricultural Employees or Claim for Refund*. Revised February 2023. Posted 2/22/23.

The Purpose of *Keep Up to Date on Payroll*

Keep Up to Date on Payroll helps Payroll practitioners stay current with all the changing laws and regs.

The quick-read, easy-to-understand format gets right to the point, so you don't have to waste any time.

Keep Up to Date on Payroll provides timely information about new laws and regs, and gives you a heads-up about coming changes – so you have plenty of time to prepare.

State law and reg changes Payroll needs to know

Don't see your state here? You can find additional state and local items online – it's included with your subscription. Check out our interactive map, too. Log on today!

ARIZONA

- **EARNED WAGE ACCESS:** The state attorney general has answered a question, submitted by a state senator, about whether an earned wage access (EWA) product would be considered a consumer loan under state statutes. According to *Opinion 122-005*, the answer is no if the EWA product is offered as a no-interest and non-recourse product. **More info:** www.azag.gov/sites/default/files/2022-12/122-005.pdf

CALIFORNIA

- **COVID-19:** The state of emergency the governor had in place since March 4, 2020, ended Feb. 28, 2023. Also, the Supplemental Paid Sick Leave Law – which was available when employees or their family members tested positive for COVID-19 – expired on Dec. 31, 2022. **More info:** bit.ly/california664

COLORADO

- **EXEMPT EMPLOYEES:** In 2023, exempt executive, administrative and professional employees must be paid at least \$961.54 per week. The rounded annual equivalent of that is \$50,000. For exempt highly compensated employees, the salary threshold is \$112,500 annually – and at least \$961.54 per week. **More info:** bit.ly/colorado664

ILLINOIS

- **DATA PRIVACY:** The Illinois Supreme Court recently ruled an employer had violated the state's Biometric Information Privacy Act. The employer had required

an employee to scan her fingerprints to access her paystubs, and then a third party verified the scans. Problem was, the employer didn't first get her written consent. The company argued because 10 years had passed since it first obtained her biometric data, her claim was untimely. The court disagreed. Each time a private entity scans or transmits someone's biometric information, a new claim accrues, the court said in *Cothron v. White Castle*. **More info:** bit.ly/illinois664

MAINE

- **EXEMPT EMPLOYEES:** The salary threshold for who can be classified as exempt from overtime has increased to \$796.17 per week, or \$41,401 per year. The amount is based on the minimum wage, which also increased for 2023 to \$13.80 per hour (was \$12.75). **More info:** bit.ly/maine664

MASSACHUSETTS

- **INCOME TAX:** As of Jan. 1, 2023, the 4% surtax on taxable income above \$1 million is in effect. The Dept. of Revenue (DOR) said that it doesn't plan to update its income tax withholding table to incorporate the surtax, adding that employers should use their best efforts to calculate how much to withhold. The DOR also said for returns and payments due Jan. 31, 2024, the surtax won't be taken into account to determine if an employer withheld sufficient tax. **More info:** www.mass.gov

NEW YORK

- **EXEMPT EMPLOYEES:** As of Dec. 31, 2022, the salary threshold for who's exempt as an executive or administrative employee has increased. It's now \$1,064.25 per week, up from \$990 per week. The salary threshold is set at 75 times the state's minimum wage, which is currently \$14.20 per hour.

More info: dol.ny.gov/system/files/documents/2022/09/proposed_regulatory_text_2022.pdf

OREGON

- **PAID LEAVE:** The method for determining the number of employees employed by an employer for Paid Family Medical Leave Insurance purposes has been changed. Now it's the number of employees on the payroll for the pay period that includes the 12th of the month. **More info:** bit.ly/oregon664

WEST VIRGINIA

- **INCOME TAX:** HB 2526 would reduce the personal income tax rate – retroactive to Jan. 1, 2023. Under a current Senate amendment, the decrease would be less dramatic than originally planned. We'll keep you posted. **More info:** bit.ly/wv664

THE LIGHTER SIDE

If you decided to get a vanity license plate, what would you want it to say?

How about "CASH"?

The owner of that customized license plate in California is selling the rights to it.

Claude Arthur Stuart Hamrick of San Jose, CA, got the money-centric plate in 1970 – it's been registered to his name ever since.

But he's 83 now, and the retired patent lawyer is ready to give up the vanity plate.

He's asking a mere \$2 million.

Apparently, if you want to have "CASH" on the back of your vehicle, you'll have to part with a lot of the same from your pockets.

Cite: UPI, "California Man Selling His 'CASH' Vanity Plate for \$2 Million," 2/27/23.