

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™

**April 1, 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

- **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.
- **April 20, 2023:** Deposit taxes for payroll on April 12, 13, 14.
- **April 21, 2023:** Deposit taxes for payroll on April 15, 16, 17, 18.
- **April 26, 2023:** Deposit taxes for payroll on April 19, 20, 21.
- **April 28, 2023:** Deposit taxes for payroll on April 22, 23, 24, 25.

### ■ 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.

## IRS final regs on mandatory e-filing require aggregation

### ■ Details on how to handle corrected returns

According to new, final regs, the IRS has dropped the e-filing threshold to 10 returns in aggregate – that includes W-2s, 1099s and more – for TY 2023.

In so doing, the IRS leaped over its originally intended stepping stone of 100 returns in aggregate.

That phased approach, down from the current 250 returns, had been the plan laid out in proposed regs issued July 23, 2021.

Here's an example of how the final regs may play out at some companies. Let's say for TY 2022, Payroll had 250 W-2s to file and, therefore, was required to e-file. Meanwhile, A/P had 10 forms in the 1099 series to file and did so on paper. Benefits

filed 240 Forms 1095-C on paper. For TY 2023, all those forms – and many others – would need to be filed electronically to comply with the final regs issued in February of 2023.

### In the same manner

The final regs go further than that, and here's where many businesses will feel the most impact: Any corrected returns your company ends up filing for TY 2023 will need to be submitted in the same manner as the original returns. So, for example, if you file Forms W-2 electronically, you'd need to e-file any corrected W-2s as well.

Depending on what software an employer uses, that might be

*(Please see Final regs ... on Page 2)*

## Can these medical expenses be paid under HSAs?

The IRS has created FAQs, detailing what can be paid or reimbursed under tax-favored health plans, like health savings accounts (HSAs).

The FAQs deal with medical expenses related to nutrition, wellness and general health.

If your company offers HSAs, health flexible spending arrangements, Archer medical savings accounts or health reimbursement arrangements, here are a few items of note:

### The word from the IRS

It's no surprise that the cost of a dental exam or an eye exam

is a medical expense that can be paid or reimbursed under the health plans.

As for therapy, that depends. While therapy to treat a diagnosed mental illness is a reimbursable medical expense, marital counseling isn't.

The cost of nutritional counseling that treats a diagnosed disease, such as diabetes, can be paid under HSAs and other health plans – otherwise, no.

What about nutritional supplements? Yes, but only if they're recommended by a medical practitioner as treatment for a specific, diagnosed medical condition.

More info: [bit.ly/medical665](https://bit.ly/medical665)

## Not enough lactation rooms available during nursing mothers' break times

■ POLICY REQUIRED DOCTOR'S NOTE AND BABY'S BIRTH CERTIFICATE

The Fair Labor Standards Act (FLSA) says an employer must give a nursing mother a reasonable amount of break time to express milk and also provide a private space for that.

But what about when there's more than one nursing mother on premises? How about almost 20? At a plant in Michigan, 19 mothers had to share four one-person lactation rooms.

The Dept. of Labor learned that due to inadequate space, some employees had to express milk in the community shower area and even on the factory floor. Otherwise, they'd have to wait 20 minutes for a lactation room to become available.

That wasn't the only problem at the Sterling Heights, MI, location. Before a mother could access the lactation rooms, she had to submit a doctor's note and the baby's birth certificate.

A policy like that isn't allowed under the FLSA.

To correct the problems, the global automobile manufacturer has agreed to create additional lactation rooms and fix its break policy.

### Nonexempt and exempt employees

The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act became law at the end of 2022, amending the FLSA.

Previously, employers had to accommodate only nonexempt employees. The PUMP for Nursing Mothers Act also extended protections to nursing mothers who are exempt.

For nonexempt and exempt employees, the protections last for up to one year after the child's birth.

**More info:** [www.dol.gov/newsroom/releases/whd/whd20230208](http://www.dol.gov/newsroom/releases/whd/whd20230208)

### Final regs ...

(continued from Page 1)

a challenge – the IRS received comments about that in response to its proposed regs. Nonetheless, the IRS anticipates that software companies will develop new options that allow employers to more easily file corrected returns.

### Starting point: Taxpayer First Act

The authorization for increased electronic filing came from the Taxpayer First Act of 2019.

Now that the IRS has provided the final regs on e-filing, the need for solid internal communication at companies has intensified.

If your company uses more than one type of software or platform for electronic filing, consider whether a tech consolidation would be feasible and/or preferred.

Also, the sooner the better for your company to reach out to its software providers to ask about their current and anticipated capabilities.

**More info:** [bit.ly/electronic665](http://bit.ly/electronic665)

## COMPLIANCE CHECK

### ■ 2 LAWS BROKEN, MORE THAN \$40K OWED TO EMPLOYEES

Woodland Moving and Warehouse Inc. and subsidiary ARL Transportation LLC of West Hartford, CT, violated the Service Contract Act (SCA) – they're under contract with the U.S. Postal Service – and the Fair Labor Standards Act (FLSA).

The employers owed:

- \$32,808 in prevailing wages as well as holiday and vacation pay to 22 drivers under the SCA, and
- \$8,413 to one employee who'd been misclassified as an executive exempt employee under the FLSA.

**More info:** [bit.ly/connecticut665](http://bit.ly/connecticut665)

### ■ MANAGERS EARNED LESS THAN \$684 PER WEEK

Mio's Pizza, with locations in Cincinnati and Milford, OH, violated the Fair Labor Standards Act. An investigation occurred before the restaurant changed hands in late 2022. The prior owners failed to follow hours standards for minors and didn't pay managers classified as exempt at least \$684 per week. The business owed:

- \$11,950 in back wages and liquidated damages, and
- \$30,000 in civil money penalties.

**More info:** [bit.ly/pizza665](http://bit.ly/pizza665)

### ■ PLASTERING COMPANY PAID EMPLOYEES 'BY THE YARD'

Palo Verde Plastering Inc. in Glendale, AZ, paid straight time instead of time-and-a-half in violation of the Fair Labor Standards Act. The company paid employees "by the yard," saying they weren't entitled to overtime. It also failed to keep accurate records. The cost was:

- \$700,000 in back wages and liquidated damages owed to 470 employees, and
- \$23,787 in civil money penalties.

**More info:** [bit.ly/arizona665](http://bit.ly/arizona665)

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## Paycheck contains overpayment? Do's and don'ts for recouping funds

■ WHAT'S EXPECTED VARIES ON FEDERAL AND STATE LEVELS

Ugh, you just realized you overpaid an employee, and while you're anxious to recoup the money, you know staying in compliance is critical.

Speaking at a recent Premier Learning Solutions workshop – *Payroll Deductions: Your Guide to Compliant, Accurate Deductions* – Vicki Lambert explained what laws to take into account.

First, you have to get past the Fair Labor Standards Act (FLSA). If you can't do that, there's no reason to move on to any state laws, Lambert shared with participants during the February 2023 workshop.

Walk employees through the math, so they understand what happened. Under the FLSA, they have to agree they were overpaid. Although not required, getting their approval in writing before recouping the money is best from a legal perspective.

For nonexempt employees, the principal can cut into minimum wage and overtime. However, that's not the case with administrative costs and interest, Lambert cautioned.

For exempt employees, you can

recoup the money without violating the salary basis rule.

### Examples of state laws

As for states, most of them require prior notification – you should also get permission from the employee in writing before taking funds back.

The laws in California are so strict that it's probably not worth trying to recoup money there. In New York, you have a slim chance, but only if your paperwork is perfect, said Lambert.

In Indiana, employers that want to recoup overpayments are considered creditors and are limited to 25% of disposable earnings per paycheck.

Maine says no more than 5% of net can be taken back per paycheck unless the employee agrees.

Kentucky has no limit, but employees must earn the minimum wage for each hour worked. Pennsylvania has restrictions tied to minimum wage.

In Washington, the issue is time. You have 90 days from the initial overpayment to detect the error and implement a plan.

Of course, you'll want to get your policies in writing, Lambert noted.

More info: [www.learningpremier.com](http://www.learningpremier.com)

## Research tax credit disallowed, penalties incurred

One company that claimed a research tax credit shouldn't have done so, according to a recent federal appeals court ruling.

In addition to disallowing the tax credit, the IRS had determined the company owed penalties for tax deficiency and inaccuracy.

The Indiana shipbuilding company, Little Sandy Coal Co. Inc., said 11 vessels it built qualified for a tax credit under Internal Revenue Code Sec. 41.

These were "first-in-class" vessels and one type hadn't previously been built there, the company explained.

But the novelty argument didn't convince the U.S. Tax Court or the Seventh Circuit Court of Appeals. At least 80% of that shipbuilding activity needed to – but didn't – involve the process of experimentation.

### Production/nonproduction wages

If eligible, a business might be able to claim the research tax credit on supply costs or wages.

For example, the Indiana company tied production and nonproduction wages to its research expenses.

More info: [bit.ly/taxcredit665](http://bit.ly/taxcredit665)

## ■ SSA ANNOUNCES NEW AUTHENTICATION PROCESS

During the March IRS Payroll Industry Call, SSA's Matt Newton gave employers a heads-up about new authentication requirements for accessing business services online (BSO) – for example, to file W-2s.

The change will apply to new and existing BSO users, Newton said.

More info: [www.ssa.gov](http://www.ssa.gov)

## ■ 'DIRTY DOZEN' UPDATED WITH WARNING ABOUT ERC

The IRS has added another scam to its *Dirty Dozen* list. This one involves the employee retention credit (ERC).

Some promoters of the ERC have been misleading businesses regarding their eligibility for the tax credit. The promoters fail to explain limitations – e.g., only recovery startup businesses are eligible for the ERC in Q4 of 2021.

Another limitation that doesn't get communicated: Employers can't claim the ERC on wages reported as payroll costs when seeking loan forgiveness under the Paycheck Protection Program.

More info: [bit.ly/erc665](http://bit.ly/erc665)

## ■ 2 AGENCIES TAKE AIM AT 'EMPLOYER-DRIVEN DEBT'

On March 7, 2023, the Consumer Financial Protection Bureau (CFPB) and the National Labor Relations Board (NLRB) entered into an agreement to share information with each other.

One area the CFPB and NLRB say they're concerned about is "employer-driven debt." This can occur when employers mandate training or equipment that employees might not need or that's more expensive or harmful than available elsewhere. That results in employees being in debt to current or former employers.

More info: [bit.ly/debt665](http://bit.ly/debt665)

# On-demand pay, additional Medicare tax addressed in revenue proposals

■ TREASURY DEPT. GREEN BOOK  
RELEASED FOR FISCAL YEAR 2024

The Treasury Dept. issued the so-called Green Book on March 9, 2023, providing an in-depth look at the federal government’s FY 2024 revenue proposals.

Treasury’s document was released on the same day as the \$6.9 trillion budget proposal.

Here are some highlights from the *General Explanations of the Administration’s Fiscal Year 2024 Revenue Proposals*.

## On-demand pay

Again this year, the Treasury Dept. said federal legislation that clarifies the tax treatment of on-demand pay arrangements is needed.

The Green Book explains that with on-demand pay, employees typically use mobile apps to access accrued wages before the regular pay cycle has ended. The payments are transferred to a bank account, pre-paid debit card or payroll card.

An ongoing point of concern – for

regulators and Payroll pros alike – is whether employees with access to on-demand pay arrangements are in constructive receipt of their wages.

That’s important to know for the timely withholding and depositing of employment taxes.

In light of that, Treasury repeated some proposals from last year, such as amending Sec. 3401(b) of the Internal Revenue Code to provide that the payroll period for on-demand pay arrangements would be considered weekly, even if employees have access to their wages more often than that.

For tax purposes, a weekly basis would be less of a financial and administrative burden than a daily basis, the Green Book notes.

## Additional Medicare tax

Treasury also discussed increasing the additional Medicare tax rate.

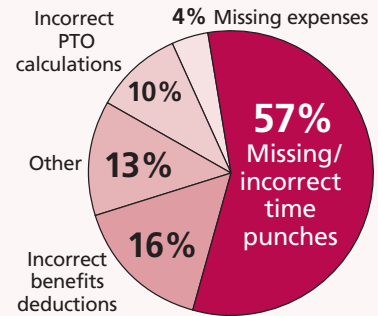
The reason given for the rate hike? The Hospital Insurance Trust Fund is projected to be exhausted in 2028.

Currently, the additional Medicare tax rate is 0.9% for single and head of household filers reaching the

## WHAT PAYROLL PROS TOLD US

### Avoiding payroll errors

Which payroll error does your organization struggle with the most?



Source: The Real Cost of Payroll Errors and How to Avoid Them, 2023 webinar poll

Busy employees sometimes need reminders about punching in and out. Also, encourage them to check their timecards for accuracy before submitting them each pay period.

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

\$200,000-earnings threshold and joint filers reaching the \$250,000-earnings threshold. As proposed, the rate would increase 1.2% percentage points (so, going up to 2.1%) for taxpayers exceeding \$400,000 in earnings.

More info: [home.treasury.gov/system/files/131/General-Explanations-FY2024.pdf](https://home.treasury.gov/system/files/131/General-Explanations-FY2024.pdf)

## REAL-LIFE SCENARIO: DID THEY GET IT RIGHT?

### Exempt employee received 7 paychecks – none equaled expected salary amount

A skilled nursing facility in Illinois faced this real-life scenario:

The employer hired a unit manager to supervise six or seven licensed practical nurses. She was hired at a salary of \$68,640, or \$2,640 biweekly.

After three months, she quit – two years later, she brought a Fair Labor Standards Act case against the employer, seeking unpaid overtime.

The employer had classified her as an executive exempt employee. The employer called into question whether she was paid on a salary basis, pointing out the variations in her pay. So, the court took a closer

look at the seven paychecks she’d received and why the amounts varied.

**Check #1:** \$2,112. Her first day was in the middle of the pay period.

**Check #2:** \$3,154. She’d picked up an extra shift during the pay period and so received a \$250 bonus. Also, she was accidentally paid \$264, which the employer chose not to recoup.

**Check #3:** \$3,140. This check included a \$500 bonus because she worked two extra shifts.

**Check #4:** \$3,140. Same as above.

**Check #5:** \$2,348.79. She once again received a \$500 bonus. Also, she didn’t get paid for three days – she’d

taken time off but hadn’t yet accrued vacation time.

**Check #6:** \$3,890.79. Five extra shifts meant a \$1,250 bonus.

**Check #7:** \$1,320. She stopped working in the middle of a pay period.

None of her paychecks equaled the anticipated \$2,640, but all for legit reasons, the court said. She’d been paid on a salary basis.

## Checklist for compliance

When it comes to the salary basis test, the FLSA allows you to:

- pay bonuses, and
- deduct for full-day absences.



## Tracking local laws and regs

### ■ City passes ordinance requiring schedules 2 weeks in advance

The Fair Workweek Ordinance in Berkeley, CA, will take effect in November 2023. The ordinance applies to employers with at least 10 employees in the city and a set number of employees globally, based on industry. Impacted industries include building services, healthcare, hotel, manufacturing, retail and others.

The ordinance says employers must provide an employee's work schedule at least two weeks in advance by:

- posting the schedule in a conspicuous place, or
- electronically transmitting the schedule.

More info: [berkeleyca.gov](http://berkeleyca.gov)

### ■ Minimum wage to increase more than \$1 on July 1, 2023

In San Francisco – both the city and the county – employers should prepare for a minimum wage increase.

The rate will go up to \$18.07

per hour on July 1, 2023. Currently, the rate is \$16.99 per hour.

The requirement extends to all employees who work in the city/county, including temporary and part-time employees.

More info: [sf.gov/labor-law-posters](http://sf.gov/labor-law-posters)

### ■ COVID-19 leave scheduled to sunset at the end of 2023

The Philadelphia Dept. of Labor recently released a “third supplemental regulation” under Chapter 9-4100 of The Philadelphia Code.

The code is entitled Promoting Healthy Families and Workplaces, and the regulation explains that this deals with three distinct leave benefits during a health emergency. The leave benefits are Accrued Leave Benefit, Health Care Epidemic Leave Benefit and COVID-19 Leave.

As the regulation states, COVID-19 Leave began March 9, 2022, and is scheduled to sunset Dec. 31, 2023.

More info: [bit.ly/philadelphia665](http://bit.ly/philadelphia665)

## 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:*

### FLSA: What duties are required for the executive exemption?

**Q:** Under the Fair Labor Standards Act (FLSA) regs, what duties are required for employees to qualify for the executive exemption?

**A:** That depends on whether you're considering the general rule or the highly compensated employee (HCE) rule for executive employees. Under the general rule, employees must carry out three responsibilities. First, they must manage the enterprise or a subdivision of

it. Second, they will need to “customarily and regularly” (i.e., more often than occasionally but not necessarily constantly) direct the work of two or more other full-time employees. Note: You can count full-time equivalent employees. Third, executive exempt employees must have the power to hire or fire – or their suggestions regarding issues like hiring, firing, advancement and promotion must be given particular weight. Under the HCE rule, they need to carry out only one of those responsibilities.

More info: [www.dol.gov/agencies/whd/fact-sheets](http://www.dol.gov/agencies/whd/fact-sheets)

Send questions to [jweiss@HRMorning.com](mailto: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.

- *Instructions for Schedule B (Form 941)*. Revision date: March 2023. Posted date: 2/23/23.
- *Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers*. Revision date: March 2023. Posted date: 2/23/23.
- *Instructions for Schedule R (Form 941)*. Revision date: March 2023. Posted date: 2/23/23.
- *Form 941, Employer's Quarterly Federal Tax Return*. Revision date: March 2023. Posted date: 2/23/23.
- *Instructions for Form 941*. Revision date: March 2023. Posted date: 2/23/23.
- *Form 8974, Qualified Small Business Payroll Tax Credit for Increasing Research Activities*. Revision date: March 2023. Posted date: 2/24/23.
- *Instructions for Form 8974*. Revision date: March 2023. Posted date: 2/24/23.
- *Instructions for Form 1042-S*. Revision date: 2023. Posted date: 3/3/23.
- *Form CT-2, Employee Representative's Quarterly Railroad Tax Return*. Revision date: March 2023. Posted date: 3/6/23.
- *Publication 510, Excise Taxes*. Revision date: March 2023. Posted date: 3/6/23.

### 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!*

**CALIFORNIA**

- **PAY DATA REPORTING:** With the May 10, 2023, deadline drawing near to submit pay data reports, the California Civil Rights Dept. updated its FAQs. The info added Feb. 22, 2023, addresses employees hired through labor contractors. Such an employee would need to be reported if – among other things – he or she performs labor for a client employer “within the client employer’s usual course of business.” That’s defined in the FAQs as someone who does regular and customary work that’s either part of the client employer’s customary business or necessary for its preservation or maintenance. **More info:** [calcivilrights.ca.gov/paydatareporting/faqs](http://calcivilrights.ca.gov/paydatareporting/faqs)
- **PAY TRANSPARENCY:** The California Equal Pay Act was expanded on Jan. 1, 2023. Records containing job title and wage rate history must be kept during the time someone is employed and for three years after that. An employer with 15 or more employees must include pay scales for positions in job postings. **More info:** [www.dir.ca.gov/dlse/california\\_equal\\_pay\\_act.htm](http://www.dir.ca.gov/dlse/california_equal_pay_act.htm)

**ILLINOIS**

- **RETIREMENT:** The requirements of the Illinois Secure Choice Savings Program are in place. The Illinois Dept. of Revenue (IDOR) says it has begun issuing IDOR-2P-NT, Notice of Proposed Assessment, and IDOR-2-BILL-NT, Notice of Assessment. Employers can avoid penalties by coming into compliance with the program within 120 days of the issue date on the IDOR-2P-NT. That’s according to

the IDOR’s February 2023 *Informational Bulletin*. Employers that don’t offer a qualified retirement plan, have been in business for at least two years and employ at least five employees will need to comply with the program. **More info:** [bit.ly/illinois665](http://bit.ly/illinois665)

**MASSACHUSETTS**

- **PARENTAL LEAVE:** The Massachusetts Parental Leave Act (MPLA) has been in place since 2015, but the Massachusetts Commission Against Discrimination only recently issued proposed guidelines. The 32-page document contains many details, including descriptions of types of leave (continuous, intermittent and reduced schedule) and what to do if the employer’s leave is more generous than required. **More info:** [bit.ly/massachusetts665](http://bit.ly/massachusetts665)

**MICHIGAN**

- **UNEMPLOYMENT INSURANCE:** The unemployment insurance taxable wage base for 2023 is \$9,500, unchanged from last year. **More info:** [www.michigan.gov/leol/bureaus-agencies/uia](http://www.michigan.gov/leol/bureaus-agencies/uia)

**NEW YORK**

- **QUOTAS:** The effective date of a new law, the Warehouse Worker Protection Act (WWPA), has been moved from Feb. 19, 2023, to June 19, 2023. Also, some definitions in the law have been amended. For example, an “employee” is someone who’s nonexempt from minimum wage and overtime rules. Also, a driver or courier to or from a warehouse distribution center wouldn’t be an employee. The WWPA is designed to protect warehouse workers from the pressure of quotas. One provision ensures compliance with meal and rest periods. **More info:** [www.nysenate.gov/legislation/bills/2023/S851](http://www.nysenate.gov/legislation/bills/2023/S851)

- **VETERANS’ BENEFITS:** As of Jan. 1, 2023, employers must display a poster containing information about veterans’ benefits and services. That’s because the state labor law has been amended by S1961B. The new law applies to employers with 50 or more employees. **More info:** [www.nysenate.gov/legislation/bills/2021/S1961](http://www.nysenate.gov/legislation/bills/2021/S1961)

**NORTH DAKOTA**

- **INCOME TAX:** Three bills before the legislature – HB 1118, HB 1158 and HB 1425 – aim to reduce income tax rates. According to the Tax Foundation, all three bills would lower the top marginal rate (currently, 2.9%), and two of them would move the state toward a flatter tax (currently, a five-bracket system). We’ll keep you posted. **More info:** [taxfoundation.org/north-dakota-income-tax-reform](http://taxfoundation.org/north-dakota-income-tax-reform)

**THE LIGHTER SIDE**

On March 14, 2023, did you have a slice of pie?

Maybe you chose apple, cherry, pumpkin or pecan.

It was, after all, Pi Day.

Of course, in mathematics, when you divide the circumference of a circle by its diameter, you get pi.

It’s value is one of those numbers that sticks with you – 3.14.

Extending the decimal place out a little farther for rounding purposes, you get 3.14159.

With that in mind, some people like to celebrate on 3/14 each year, with the really enthusiastic folks doing so at 1:59 (a.m. or p.m. – that doesn’t matter). What *does* matter is celebrating Pi Day is one task “on your plate” you can really enjoy.

**Cite:** [www.census.gov/newsroom/stories/pi-day.html](http://www.census.gov/newsroom/stories/pi-day.html)