

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 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

- **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.
- **May 3, 2023:** Deposit taxes for payroll on April 26, 27, 28.
- **May 5, 2023:** Deposit taxes for payroll on April 29, 30; May 1, 2.
- **May 10, 2023:** Deposit taxes for payroll on May 3, 4, 5.
- **May 12, 2023:** Deposit taxes for payroll on May 6, 7, 8, 9.

### 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.

## Does FLSA allow you to dock exempt employee's PTO bank?

### ■ First time federal appeals court has ruled on this

You know that exempt employees must earn at least \$684 per week under current Fair Labor Standards Act (FLSA) regs. Plus, no matter how much they earn, you generally can't reduce the weekly amount they've been guaranteed.

But what about making deductions from their paid time off (PTO) banks? That question hadn't been brought to a federal appeals court until recently – in *Higgins v. Bayada Home Health Care Inc.* Here's how the Third Circuit dealt with the issue of accrued PTO and exemptions under the FLSA.

### Productivity points system

At Bayada, registered nurses and other clinicians who provided in-home

medical support to clients had to meet productivity goals each week.

If the clinicians exceeded the level laid out in the productivity points system, they received additional compensation that week.

If they fell below the level, the employer withdrew from their available PTO. Of note, when the employees didn't have any accrued PTO, the employer didn't reduce their base pay.

The clinicians who brought the lawsuit said that by deducting from their PTO banks, the company had in effect deducted from their salary. Reducing an employee's salary as a

*(Please see PTO bank ... on Page 2)*

## 2024 SS taxable wage base projected to increase

While you often have to wait until the end of summer to hear about the following year's estimated taxable wage base, that information has already been released for 2024.

The projected Social Security taxable wage is \$167,700. That's up from the current number of \$160,200.

That'd be a \$7,500 increase, based on data in *The 2023 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance.*

The report was released on March 31, 2023.

At the 6.2% rate, the maximum

employees and employers would each need to pay in Social Security tax next year would be \$10,397.40.

### Looking ahead

The report provides projections beyond 2024:

- \$174,900 in 2025
- \$181,200 in 2026
- \$188,700 in 2027, and
- \$196,500 in 2028.

The final 2024 number is expected in October. We'll keep tabs on that.

**More info:** [www.ssa.gov/OACT/TR/2023/tr2023.pdf](http://www.ssa.gov/OACT/TR/2023/tr2023.pdf)

## Workers exchanged earned overtime for paid leave at straight time rates

■ ALSO, COMMISSIONS AND BONUSES NOT INCLUDED IN REGULAR RATE

If employees work more than 40 hours in a workweek, they must be paid time-and-a-half their regular rate of pay.

But a wholesale gifts and novelties business in Asheville, NC, allowed its employees to exchange the extra hours for paid time off.

The overtime premium wasn't even factored in – not that it would've made things right if it had been.

The Dept. of Labor found other problems during its investigation of AFG Distribution.

The company didn't include the following items in the regular rate of pay for overtime purposes:

- monthly commissions earned by sales personnel, and
- quarterly bonuses.

For these Fair Labor Standards Act (FLSA) violations, the company had to pay \$143,961 in back wages and an equal amount in liquidated damages to 152 workers.

### Private or public sector

While employers in the public sector can offer comp time in lieu of overtime, according to the FLSA regs, employers in the private sector don't have the same flexibility.

If a public-sector employer does allow nonexempt employees to take time off instead of receive cash, the rate must be one-and-a-half times the number of OT hours worked. So, someone who put in 45 hours in a week, for example, would've earned seven-and-a-half comp time hours.

**More info:** [www.dol.gov/newsroom/releases/whd/whd20230202](http://www.dol.gov/newsroom/releases/whd/whd20230202)

### PTO bank ...

(continued from Page 1)

result of decreased productivity isn't allowed under the FLSA regs.

However, there's a distinction, between fringe benefits such as PTO and a salary. PTO isn't part of an employee's salary, the federal appeals court decided, agreeing with the lower court's ruling.

Therefore, when the employer in the case docked the clinicians' PTO banks, that wasn't a violation of the salary basis test, the Third Circuit explained. After all, the guaranteed weekly salary amount hadn't changed.

The same reasoning would apply if employees could convert their accrued PTO into cash at some point, the court added.

The Third Circuit covers Delaware, New Jersey and Pennsylvania – it's not known how other appeals courts might rule. If you're considering a system for docking PTO banks, it's safest to seek legal counsel.

**More info:** [www2.ca3.uscourts.gov/opinarch/213286p.pdf](http://www2.ca3.uscourts.gov/opinarch/213286p.pdf)

## COMPLIANCE CHECK

### ■ DIDN'T REMIT FUNDS FOR MEDICAL INSURANCE PLAN

Stratagem Inc., a now defunct information technology company in Milwaukee, WI, violated the Employee Retirement Income Security Act by withholding voluntary salary contributions but failing to remit them to its group medical insurance plan. A federal district court judge has ordered the company and the plan to restore:

- \$15,124 in employee contributions, and
- \$2,960 in lost opportunity costs.

**More info:** [bit.ly/erisa666](http://bit.ly/erisa666)

### ■ TIME SPENT TRANSPORTING SEASONAL WORKERS

Jamison's Ice Cream LLC, operating as Sawyer's Ice Cream, in Gilford, NH, failed to follow the provisions of the Fair Labor Standards Act. The company didn't pay full overtime wages; employees who transported seasonal workers to and from work didn't get paid; and 14 years olds worked more hours than allowed by law.

The company had to pay:

- \$38,176 to 26 workers for the wage violations, and
- \$6,160 civil money penalty for the child labor violations.

**More info:** [bit.ly/seasonal666](http://bit.ly/seasonal666)

### ■ EMPLOYER MUST CREATE COMPLIANCE ACTION PLAN

Kline Welsh Behavioral Health Foundation, a substance abuse treatment facility in Honolulu, didn't pay overtime or minimum wage or keep payroll records.

For these Fair Labor Standards Act (FLSA) violations, the employer must submit a Compliance Action Plan and pay:

- \$451,989 in back wages to 34 employees, and
- \$10,000 in civil money penalties.

**More info:** [bit.ly/hawaii666](http://bit.ly/hawaii666)

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## Penalties for Affordable Care Act violations will increase in 2024

■ IRS REVENUE PROCEDURE  
LISTS NEXT YEAR'S AMOUNTS

The IRS has announced 2024 penalty amounts for Affordable Care Act (ACA) violations.

First, by way of reminder, here are the 2023 numbers:

- \$2,880 for Internal Revenue Code Sec. 4980H(a) violations, and
- \$4,320 for Sec. 4980H(b) violations.

Now, here are the 2024 penalty amounts that the IRS recently released in Revenue Procedure 2023-17:

- \$2,970 (a \$90 increase), and
- \$4,460 (a \$140 increase).

The Sec. 4980H(a) penalty applies if: 1) an employer doesn't offer minimum essential coverage to at least 95% of its full-time employees, and 2) even one employee signs up for coverage in the Health Insurance Marketplace and receives the premium tax credit.

As for the Sec. 4980H(b) penalty, that can apply even if an employer offers minimum essential coverage to at least 95% of its full-time employees. The penalty kicks in if someone signs up for coverage in the Health Insurance Marketplace and receives the premium

tax credit. That may happen if the employer didn't offer coverage to that particular employee or the coverage either wasn't affordable or didn't provide minimum value.

### 2 methods available

Payroll can be instrumental in figuring out which employees are full-time for purposes of the employer shared responsibility provisions. The goal is to identify which individuals work an average of 30 hours per week or 130 hours per month. There are two methods for doing that:

- The monthly measurement method may work for your company if employees' schedules don't fluctuate much. You'd count each employee's hours of service per month.
- The look-back measurement method requires you to use a *measurement period* (so you can gather data on employees' hours of service in a prior period) and a *stability period* (in which you settle on who's full-time). Note: The look-back measurement method can't be used to determine if you're an applicable large employer.

More info: [www.irs.gov/pub/irs-drop/rp-23-17.pdf](http://www.irs.gov/pub/irs-drop/rp-23-17.pdf)

## New instant payment system to launch in July 2023

The Federal Reserve says it plans to launch its instant payment service in July 2023.

Financial institutions will be able to choose whether to participate in the FedNow Service.

If a bank that your business uses opts to participate, you'll be able to send and receive instant payments at any time of day.

What's more, recipients will gain access to their funds immediately.

FedNow will be available to large and small financial institutions, and the U.S. Treasury intends to use the

service, the Federal Reserve explained in a recent press release.

### What's currently available

Another system for electronically transferring funds – the ACH Network – is popular among employers for direct deposit and other purposes.

With that system, governed by Nacha, payments are settled four times per day. The Same Day ACH option first became available in 2016 and since then has continued to expand.

More info: [bit.ly/FedNow666](https://bit.ly/FedNow666), [bit.ly/SameDayACH666](https://bit.ly/SameDayACH666)

## NEWS YOU CAN USE

### ■ IRS PROGRESS REPORT ON TAXPAYER FIRST ACT

How much progress has the IRS made in implementing the provisions of the Taxpayer First Act of 2019? The Treasury Inspector General for Tax Administration (TIGTA) looked into that recently.

The title of the TIGTA report says a lot: *Significant Progress Has Been Made Implementing the Taxpayer First Act*.

For example, the electronic filing of returns was one modernization effort included in the law, and the IRS recently released proposed regs on that. Also, the Internet platform for filing 1099s is up and running.

More info: [www.tigta.gov/sites/default/files/reports/2023-04/202315022fr.pdf](http://www.tigta.gov/sites/default/files/reports/2023-04/202315022fr.pdf)

### ■ YOU HAVE UNTIL JUNE 2023 TO RETAIN E-VERIFY INFO

If you want to retain information about old E-Verify cases, better act soon to download case information from the Historic Records Report.

Reason: U.S. Citizenship and Immigration Services has set a date to get rid of E-Verify records that are more than 10 years old. That date is June 24, 2023. You have until the day before that to take action.

More info: [bit.ly/records666](https://bit.ly/records666)

### ■ RETIREMENT PLANS: READY TO WITHHOLD ON DAY 1?

It's becoming more common that employers will let new employees contribute to retirement plans upon hire as a means to attract and retain employees.

According to Vanguard research, *The Changing Workforce Environment*, 72% of plans allow it. In 2012, only 58% of plans did so.

The number of plans offering matching contributions within one month of hire has also increased, the March 2023 research showed.

More info: [bit.ly/retirement666](https://bit.ly/retirement666)

## Payroll disruptions! Lessons learned following 2 troublesome situations

### ■ FIRST THE KRONOS OUTAGE AND THEN THE SVB CLOSURE

You work diligently to get employees paid on time and accurately, and then – out of nowhere – you’re hit with a disruption.

Sometimes, it’s major.

And sometimes, it makes the news.

Indeed, the payroll community has had to deal with its share of big, highly publicized disruptions over the past several years:

- First, in December 2021, Kronos experienced a cyberattack, leaving some businesses to quickly come up with alternative timekeeping and payroll processing measures.
- Then, in March 2023, when Silicon Valley Bank (SVB) and Signature Bank shut down, that impacted businesses in a variety of ways. Some businesses that had accounts with those banks – or used payroll processing companies that did – learned direct deposit payments wouldn’t reach employees’ bank accounts by payday.

So, are employers or third parties

responsible when these types of situations occur?

Generally, employers are.

You may be able to get relief on the regulatory level. For example, on the same day the Federal Deposit Insurance Corporation was appointed as the receiver of SVB, the California Employment Development Dept. announced it’d waive any penalty for late payroll tax.

Employers affected by the SVB closure could submit a waiver request, the state explained in Information Release No. 23-10.

But while regulators may give you a break, that doesn’t shield your company from employee lawsuits.

Lawsuits have been rolling in during 2023, with employees claiming their employers violated federal and state wage and hour laws due to their response to the Kronos outage.

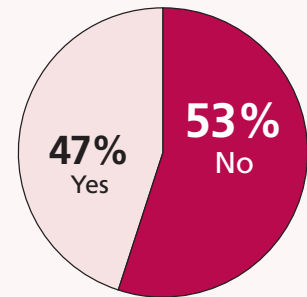
### Getting ahead of problems

You can’t avoid all disruptions, but here are some lessons your peers have learned that can help you get ahead of problems:

### WHAT PAYROLL PROS TOLD US

#### Employee monitoring

Will the use of tech-enabled, employee-monitoring tools become standard for most companies?



Source: Future Employer Survey 2022, Seyfarth, 200 respondents

Even if tech-enabled tools, such as mail or location monitoring or video surveillance, become more common, be careful: Laws may require notification.

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

- Ask your third-party partners about their business continuity plan.
- Consider having multiple backups of payroll info.
- Have clearly communicated procedures on how employees will record hours worked if your time and attendance system is unavailable.

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

## Employees used pictures of themselves working after 5 p.m. as proof of OT

A commercial construction company in Maryland faced this real-life scenario:

The employer didn’t use timecards or any other formal system. Rather, a payroll clerk made handwritten notations on a desk calendar.

She noted late arrivals and early departures, along with vacation or sick leave. However, she didn’t track early arrivals or late departures or missed lunch breaks.

When two employees brought overtime claims under the Fair Labor Standards Act (FLSA) and state law, the informal calendar system didn’t

provide the information the company needed to disprove the claims.

One employee said that on average she worked 51.5 hours per week – the other, 47 hours per week.

While the employees had no documents that proved they worked more than their scheduled hours of 8 a.m. to 5 p.m., they did submit copies of emails that had been sent well after the end of the workday – e.g., 9:15 p.m. and 10:05 p.m. They even provided pictures of themselves in the office after 5 p.m. In one photo, they were in the office at 6:55 p.m.

The company argued that although

one of the employees was sometimes in the office after 5 p.m., she was either having personal conversations or making up for having arrived late.

Due to the conflicting evidence, the court didn’t grant summary judgment to the employees or the employer.

### Checklist for compliance

- Employers, not employees, bear the responsibility to keep records of hours worked.
- If employees work outside of scheduled hours, supervisors may want to follow up with them about the work they accomplished.

## Tracking local laws and regs

### ■ Amendments to paid sick, safe leave law in Bloomington, MN

Bloomington, MN, has passed amendments to its earned sick and safe leave ordinance.

As of July 1, 2023, employers with five or more employees must list the amount of earned sick and safe leave on paystubs. An employer may exceed the one-hour minimum standard for accrual by recording time in fractions of an hour.

**More info:** [www.bloomingtonmn.gov/learned-sick-and-safe-leave-essl](http://www.bloomingtonmn.gov/learned-sick-and-safe-leave-essl)

### ■ In NY, more time to file taxes following storms late in 2022

Storms struck parts of New York state at the end of 2022. In response, the IRS has granted tax relief.

The counties affected by the storms that occurred between Dec. 23, 2022, and Dec. 28, 2022, are Erie, Genesee, Niagara, St. Lawrence and Suffolk.

Businesses in those locations have until May 15, 2023, to file returns and

pay taxes. That includes 2022 business returns normally due March 15, 2023, and April 18, 2023. It also includes quarterly payroll returns typically due Jan. 31, 2023, and April 30, 2023.

**More info:** [bit.ly/nyrelief666](http://bit.ly/nyrelief666)

### ■ After tornadoes rip through Mississippi, tax relief granted

Businesses located in parts of Mississippi that were hit by tornadoes and storms on March 24-25, 2023, qualify for tax relief from the IRS.

That includes four counties in the state: Carroll, Humphreys, Monroe and Sharkey.

Businesses in those locations have until July 31, 2023, to file returns and pay taxes.

That includes quarterly payroll and returns normally due April 30, 2023. Also, penalties on payroll tax deposits due on or after March 24, 2023, and before April 10, 2023, will be abated if they're made by April 10, 2023.

**More info:** [bit.ly/msrelief666](http://bit.ly/msrelief666)

## 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:*

### FMLA: Ask for documentation of family relationship?

**Q:** When employees request time off under the Family and Medical Leave Act (FMLA) to care for family members, should we ask them to produce documentation of that relationship?

**A:** Employees can take FMLA leave to care for family members with serious health conditions. According to Dept. of Labor Fact Sheet #28K, although employers are allowed to ask employees for documentation, it's not

required. If you make the request, employees need only provide a simple statement asserting the family relationship exists. They can choose to provide additional documentation. The FMLA lists a spouse, child or a parent as covered family members. The connection to a child or a parent may be biological or may exist through adoption or foster care. Employees may also care for a stepchild or step parent as well as someone who stands/stood *in loco parentis*.

**More info:** [www.dol.gov/agencies/whd/fact-sheets/28k-fmla-adult-children](http://www.dol.gov/agencies/whd/fact-sheets/28k-fmla-adult-children)

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 forms, instructions and publications contains updates.

- *General Instructions for Certain Information Returns (Forms 1096, 1097, 1098, 1099, 3921, 3922, 5498 and W-2G)*. Revision year: 2023. Posted date: 3/15/23.
- Form 8915-F, *Qualified Disaster Retirement Plan Distributions and Repayments*. Revision date: January 2023. Posted date: 3/15/23.
- Publication 5724-A, *Credit for Clean Vehicles*. Revision date: February 2023. Posted date: 3/20/23.
- Publication 5724-B, *Credit for Commercial Clean Vehicles*. Revision date: February 2023. Posted date: 3/20/23.
- Publication 5781, *Exempt Organizations Technical Guide TG 3-3 Exempt Purpose, Charitable IRC 501(c)(3)*. Revision date: March 2023. Posted date: 3/20/23.
- *Instructions for Form CT-1X, Adjusted Employer's Annual Railroad Retirement Tax Return or Claim for Refund*. Revision date: March 2023. Posted date: 3/21/23.
- Form CT-1 X, *Adjusted Employer's Annual Railroad Retirement Tax Return or Claim for Refund*. Revision date: March 2023. Posted date: 3/21/23.
- Publication 974, *Premium Tax Credit*. Revision year: 2022. Posted date: 3/21/23.

### 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!*

**COLORADO**

- **PAID LEAVE:** As of Jan. 1, 2023, employers should follow the updated rules for calculating the pay rate for leave under the Healthy Families and Workplaces Act (HFWA). The latest rules from the Dept. of Labor and Employment state that the pay rate must be at least the applicable minimum wage. The HFWA pay rate should be based on the employee's pay over the 30 calendar days that precede taking leave. Include any set hourly or salary rates, shift differentials, tip credits and commissions. But *don't* include overtime, bonuses or holiday pay. If an employee hasn't yet worked 30 calendar days, you should use the longest available period. **More info:** [bit.ly/colorado666](http://bit.ly/colorado666)

**GEORGIA**

- **INCOME TAX:** If SB 56 becomes law, it'd modify one of the conditions that must be met for a lower income tax rate. Currently, the fiscal year's net revenue collection can't be higher than it was in each of the preceding five fiscal years. The legislation seeks to change that to three fiscal years. The income tax rate is slated to be 5.49% as of Jan. 1, 2024. Then, it'd be reduced by 0.10% annually beginning Jan. 1, 2025, until the rate reaches 4.99%. We'll keep you posted on whether the governor signs the bill. **More info:** [www.legis.ga.gov/legislation/63791](http://www.legis.ga.gov/legislation/63791)

**ILLINOIS**

- **PAY TRANSPARENCY:** If HB3129 becomes law, employers would be required to include the pay scale for

a position in any job posting. This would be an amendment to the Illinois Equal Pay Act. **More info:** [bit.ly/illinois666](http://bit.ly/illinois666)

**IOWA**

- **DATA PRIVACY:** A new law, SF 262, increases data privacy requirements for certain businesses, but employment data isn't included. For example, consumers can request that their data be deleted or opt out to bar their data being sold. **More info:** [bit.ly/iowa666](http://bit.ly/iowa666)

**NEW YORK**

- **DATA REPORTING:** If S636 becomes law, certain companies would have to report data on the gender, race and ethnicity of their employees. The requirement would apply to employers that must file the EEO-1 report with the Equal Employment Opportunity Commission. We'll let you know if the legislation moves forward. **More info:** [www.nysenate.gov/legislation/bills/2023/s636](http://www.nysenate.gov/legislation/bills/2023/s636)
- **PAY TRANSPARENCY:** Prior to the Sept. 17, 2023, effective date of the state's pay transparency law, several amendments have been made. The requirements regarding job advertisements now pertain to positions to be performed at least in part in-state as well as those that'll be performed out-of-state with a supervisor, office or other work site in-state. Another change: A provision in the pay transparency law about keeping records, such as the history of compensation ranges for each job has been removed. **More info:** [legislation.nysenate.gov/pdf/bills/2023/A999](http://legislation.nysenate.gov/pdf/bills/2023/A999)

**PENNSYLVANIA**

- **ELECTRONIC FILING:** At the end of 2023, the Telefile system will no longer be available for filing returns and making payments, according to the Dept. of Revenue (DOR). Instead, the DOR asks taxpayers

to use its online filing system called MyPATH (for information, go to [mypath.pa.gov](http://mypath.pa.gov)). Note: MyPATH has replaced the previous online system called e-TIDES. **More info:** [bit.ly/pennsylvania666](http://bit.ly/pennsylvania666)

**WEST VIRGINIA**

- **INCOME TAX:** HB 2526, which was signed into law March 7, 2023, reduced the income tax by an average of 21.25% – and did so retroactively to the beginning of 2023. The employer withholding tax tables have been revised and should be used immediately. The West Virginia Tax Division has adjusted the two-earner table to account for withholding already done at the higher rates, so no further adjustments are needed. However, the one-earner table hasn't been adjusted. **More info:** [bit.ly/wv664](http://bit.ly/wv664)

**THE LIGHTER SIDE**

Greenland has just sprung forward for the final time, with the parliament voting last year for permanent daylight saving time.

The change will give those on the world's largest island less of a time-zone difference with Europe and North America.

So, if you'd prefer not to set your clocks forward one hour in the spring and then back again in the fall, should you consider relocating to Greenland?

Maybe not.

After all, during the summer months, north of the Arctic Circle, the sun's still shining at midnight. When it's winter, night can last 20 hours.

That gives a whole new meaning to working day shift or night shift.

**Cite:** [visitgreenland.com/new-time-zone](http://visitgreenland.com/new-time-zone)