

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™

June 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

- **June 16, 2023:** Deposit taxes for payroll on June 10, 11, 12, 13.
- **June 22, 2023:** Deposit taxes for payroll on June 14, 15, 16.
- **June 23, 2023:** Deposit taxes for payroll on June 17, 18, 19, 20.
- **June 28, 2023:** Deposit taxes for payroll on June 21, 22, 23.
- **June 30, 2023:** Deposit taxes for payroll on June 24, 25, 26, 27.
- **July 6, 2023:** Deposit taxes for payroll on June 28, 29, 30.
- **July 7, 2023:** Deposit taxes for payroll on July 1, 2, 3, 4.
- **July 12, 2023:** Deposit taxes for payroll on July 5, 6, 7.

■ MONTHLY DEPOSITORS

- **June 15, 2023:** Deposit taxes for payments made during May 2023.
- **July 17, 2023:** Deposit taxes for payments made during June 2023.

■ ALL EMPLOYERS

- **July 31, 2023:** File Form 941 for Q2. Note: If you properly deposited taxes on time and in full, you have until Aug. 10, 2023, to file.

IRS gives update on Form 941 and Form 941-X: The latest

■ Getting ready for second quarter reporting

As the deadline approaches for filing Form 941 for the second quarter of 2023 (see column on left), here's the latest info from the IRS.

Payroll pros should use the same version of the 941 and its instructions as was available for the first quarter (revision date March 2023) – no additional changes with those.

In the event you need to make corrections, the final version of Form 941-X and its instructions were recently issued (revision date April 2023), the IRS said during its June Payroll Industry Call.

The instructions explain that you can use the new version of the 941-X for past years, provided the statute of limitations on corrections hasn't

expired. But you should supplement the 941-X instructions with the 941 instructions that correspond to the quarter you're correcting.

Many employers have wondered about quarterly forms they've already filed with the IRS. In *IRS Operations: Status of Mission-Critical Functions*, the IRS gave an update.

As of June 1, 2023, the IRS needed to process 2 million 941s. Meanwhile, related 941-Xs have been backlogged, too – 740,000, as of May 31, 2023.

What about e-filing?

Commenting during the SSA's Spring 2023 Wage Reporting

(Please see Update ... on Page 2)

Circuit court weighs in on DOL's 2021 tip credit regs

Regs the Dept. of Labor (DOL) issued in 2021 on the tip credit have been challenged by the restaurant industry. The Restaurant Law Center and Texas Restaurant Association sued the DOL, focusing on the cost of complying with the revised regs.

A federal district court ruled in the DOL's favor as to whether the regs caused employers irreparable harm. But the Fifth Circuit reversed, sending the case back down to the lower court.

'Substantial amount of time'

Under the Fair Labor Standards Act, employers can pay tipped employees as little as \$2.13 per hour

as long as, with their tips added in, they earn the federal minimum wage – i.e., \$7.25 per hour.

As in the past, employers can take the tip credit provided that an employee doesn't spend a "substantial amount of time" on non-tip-related tasks. Previously, that was defined as exceeding 20% of the hours in a workweek for which an employer has claimed the tip credit. In 2021, the definition was expanded to also include more than 30 continuous minutes of non-tipped work.

More info: www.ca5.uscourts.gov/opinions/pub/22/22-50145-CV0.pdf

Firefighters worked 15-hour days, didn't receive correct pay rates

■ \$152K IN OVERTIME WAGES AND FRINGE BENEFITS OWED

During 2020 and 2021, when wildfires raged in Arizona, California, Oregon and Washington, KL Farms/Fire LLC brought in firefighters and truck drivers to help battle the blaze.

The employer supplied the workers for the U.S. Forest Service. One problem: The federal contractor had wrongly classified the workers as independent contractors.

Despite working an average of 15 hours per day, 57 firefighters and truck drivers received flat daily rates of between \$200 and \$250.

Under the McNamara-O'Hara Service Contract Act (SCA) and the Contract Work Hours and Safety Standards Act (CWHSSA), the:

- firefighters should have been paid a minimum rate of \$9.38

per hour plus an additional \$4.22 in fringe benefits, and

- truck drivers should have been paid \$18.20 an hour and an additional \$4.22 in fringe benefits.

So, the Dept. of Labor said the Summerville, OR, employer had to pay \$152,003 in overtime wages and fringe benefits. Per worker, that ranged from \$101 to \$14,783.

Many laws on federal contracts

The SCA and CSHSSA are two of many wage laws that may come into play if your company has contracts with the federal government.

The SCA applies to contracts in excess of \$2,500, while the CWHSSA covers contracts over \$150,000.

More info: www.dol.gov/newsroom/releases/whd/whd20230524-0

Update ...

(continued from Page 1)

Community Meeting, the IRS explained its new electronic filing regs, which lowered the e-filing threshold from 250 individual returns to 10 returns in aggregate. Note: The regs will come into play for TY 2023 – i.e., forms Payroll will submit during the 2024 filing season.

The list of forms to add up is long and – as in the past – includes Forms W-2. However, the following forms shouldn't be included in the tally to determine if you've met the 10-return threshold:

- 940
- 941
- 943
- 944, or
- 945.

That said, the IRS plans to expand the options for e-filing forms in the 94x series. That could even happen in time for the 2024 filing season, according to the IRS.

More info: www.irs.gov/form941

COMPLIANCE CHECK

■ SHOULD HAVE PAID OT FOR NON-AGRICULTURAL WORK

Columbia Empire Farms Inc., an agricultural grower and manufacturer in Portland, OR, failed to pay overtime to 43 workers. Some of them worked up to 75 hours per week. The employer misapplied an overtime exemption for agricultural workers, paying them straight time for non-agricultural work. Plus, the company had pay frequency issues.

For the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act violations, the company owed:

- \$13,828 in civil money penalties
- \$83,589 in back wages, and
- \$83,589 in liquidated damages.

More info: bit.ly/oregon670

■ WRONGFULLY FIRED FOR EXCESSIVE ABSENTEEISM

The Wicked Taco Inc., a Bradenton Beach, FL, restaurant, violated the Family and Medical Leave Act. Although an employee had a doctor's note, the restaurant forced the employee to work and later fired the individual for excessive absenteeism. So, she gets:

- \$30,033 in back wages, and
- \$30,033 in liquidated damages.

More info: bit.ly/florida670

■ RETIREMENT PLAN FUNDS NOT REMITTED, \$90K OWED

Chicago Metropolitan Obstetricians and Gynecologists Ltd., located in Harvey, IL, didn't remit over \$80,000 in voluntary salary contributions to its 401(k) plan. Also during the same three-year period, the company failed to remit employer contributions.

The Employee Retirement Income Security Act violations resulted in:

- \$90,000 in plan restoration, and
- \$18,000 in penalties due to the fiduciary breaches.

More info: bit.ly/illinois670

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Point system for absenteeism and tardiness resulted in legal dispute

■ REASONABLE ACCOMMODATIONS NOT PROVIDED, EEOC CLAIMED

One company's attendance point system ended up on the Equal Employment Opportunity Commission's (EEOC's) radar after an employee filed a complaint.

Eberspaecher North America Inc. assigned one point for absences and tardies – two when unscheduled.

As the handbook explained, if an employee accumulated 10 points in 12 months, his or her employment would be terminated.

An employee who worked at one of the company's seven facilities – in Northport, AL – took time off in compliance with the Family and Medical Leave Act (FMLA).

Although the handbook stated employees wouldn't be assigned points for such excused absences, that's what happened, he told the EEOC.

In fact, it led to his termination, he claimed.

Info about 7 facilities requested

By firing him for taking FMLA leave, the company failed to provide him with reasonable accommodations as required by the Americans with

Disabilities Act (ADA), the EEOC argued. With that in mind, it charged the company with discrimination under the ADA.

Note: The EEOC regulates the ADA, while the Dept. of Labor regulates the FMLA.

The EEOC proceeded to request information on every employee at the company's seven facilities who'd been terminated for attendance-related infractions. When the company refused to comply due to the scope of the request, the EEOC issued a subpoena.

In federal district court, the EEOC pushed to obtain the expansive information.

The court said the company would need to turn over attendance information about Northport, AL, but no other locations.

On appeal, the Eleventh Circuit agreed with the lower court and enforced only part of the EEOC's subpoena.

The company's nationwide data was irrelevant to the EEOC's charge, the federal appeals court concluded in the May 10, 2023, opinion.

More info: media.ca11.uscourts.gov/opinions/pub/files/202113799.pdf

E-Verify mismatch? 8 days to resolve it, SSA says

As of July 15, 2023, employees will once again have only eight federal working days to resolve any mismatches that turn up during the E-Verify process.

A mismatch – officially called a Tentative Nonconfirmation – means that an employee's Form I-9 information isn't the same as what SSA has on file.

In March 2020, SSA extended the deadline for employees to resolve mismatched data. Affected employees still have time to address discrepancies that employers reported to E-Verify

from March 2, 2020, to July 14, 2022. E-Verify set up a chart of its preferred deadlines, based on the Referral Date Confirmation notice. However, the hard-and-fast deadline will be Sept. 29, 2023.

Add deadline to the notice

If you haven't already done so, update each applicable Referral Date Confirmation notice to include the Sept. 29, 2023, deadline.

Then, provide copies of the notices to employees via email or hard copy.

More info: everify.gov

NEWS YOU CAN USE

■ IRS TAKES ANOTHER LOOK AT THESE 2 YEAR-END FORMS

It's been a while since the IRS updated Form W-2c – nine years, actually. The form dates back to August 2014. Similarly, it's been eight years (since November 2015) since the W-3c underwent changes.

You can review recently posted drafts of the forms. For example:

- On page 9 of the W-2c, a caution has been added about not sending SSA Forms W-2c or Forms W-3c printed from the IRS website.
- The address info on page 2 of the W-3c has changed.

More info: www.irs.gov/draft-tax-forms

■ FOR QUARTER 3, YOU WON'T SEE HIGHER INTEREST RATES

Interest rates will be unchanged for the third quarter, IRS said in Revenue Ruling 2023-11. 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-23-11.pdf

■ IRS ISSUES TAX TIP ON PAYROLL SERVICE PROVIDERS

In *Tax Tip 2023-65*, the IRS reminded employers to remain diligent when picking payroll service providers (PSPs).

Quality service is the norm. However, some PSPs will "take the money and run." The IRS says to help protect yourself, consider a provider such as a:

- certified professional employer organization
- reporting agent, or
- Sec. 3504 agent.

More info: bit.ly/psp670

FDIC report: 3 options for reforming current deposit insurance system

■ \$250,000 LIMIT WOULD BE RAISED OR ELIMINATED FOR SOME ACCOUNTS

During the first part of 2023, some Payroll practitioners learned their employees wouldn't be paid on time due to the collapse of three financial institutions – Silicon Valley Bank and Signature Bank in March and First Republic Bank in May.

One way to avoid another situation like that, according to the Federal Deposit Insurance Corp. (FDIC), is to provide greater deposit insurance to business payment accounts.

In fact, unlimited deposit insurance may be the answer, the FDIC stated in *Options for Deposit Insurance Reform*, released May 1, 2023.

Where payroll fits in

The report presents three options for reforming the deposit insurance system – it's worth noting these are recommendations, requiring action on the part of Congress.

Here's a closer look:

Unlimited coverage. This would provide unlimited deposit insurance

coverage to all types of accounts. Fully insuring all deposits would effectively eliminate the threat of bank runs but may lead to excessive risk-taking on the part of banks.

Limited coverage. With this option, the current \$250,000-limit would be increased for all depositors and account types. While small- and medium-sized businesses holding deposits modestly above the current limit may benefit from an increase, the largest uninsured deposit accounts would require a dramatic increase (perhaps millions of dollars), putting the system at further risk.

Targeted coverage. Here, coverage would vary depending on the type of account. Business payment accounts, such as those used for payroll, would be given higher deposit insurance coverage with this option. Of course, businesses utilize many types of accounts, so distinguishing among them could be a challenge.

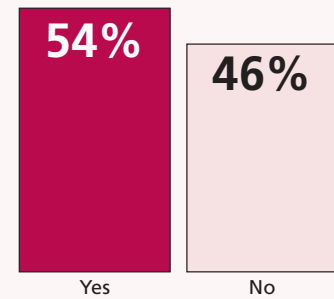
A business payment account?

Before the targeted coverage option could be pursued, a definition for business payment accounts would

WHAT PAYROLL PROS TOLD US

Automatic escalation

Would employees enrolled in retirement plans with auto-escalation agree to a contribution rate increase after 90 days?



Source: "How to Auto-Escalate Your 401(k)," Voya Financial, February 2023

While most 401(k) plans with auto-escalation raise contribution rates annually, more than half of employees wouldn't object to an increase at the 90-day mark.

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

need to be agreed upon, so such accounts could be identified.

That could be done by relying on a distinguishing identifier – e.g., an account that uses a tax ID number or employer ID number as opposed to a Social Security number, the FDIC report suggests.

More info: bit.ly/banking670

REAL-LIFE SCENARIO: DID THEY GET IT RIGHT?

New hire paperwork contained conflicting info regarding who was employer

A financial services company in Illinois faced this real-life scenario:

The financial services company provided administration and management for a skilled nursing facility. The skilled nursing facility handled supervision of staff, scheduling and other functions.

One employee and others like him who worked as admissions directors had been classified as administrative exempt and weren't paid overtime. He said both of the companies controlled employees' working conditions.

After all, during the hiring process, the financial services company

provided an acknowledgment of biometric policy and consent form, which referred to new hires as employees. Meanwhile, the skilled nursing facility had its letterhead on each employee's start-up sheet and was included on Form W-4 in the employer-completed section.

Furthermore, the two companies had give-and-take between them: The financial services company could access the personnel records of staff, while the skilled nursing facility could join the 401(k) plan.

When the employees sued under the Fair Labor Standards Act and Illinois Minimum Wage Law, the financial

services company said it wasn't their employer. The court agreed and dismissed the claims.

Looking at the economic reality test, the court noted that the skilled nursing facility – not the financial services company – supervised employees, set staffing patterns and was responsible for hiring and firing.

Checklist for compliance

- Review the company name you're using in the employer section of Form W-4.
- Consider how new hire paperwork looks from employees' viewpoint.

Tracking local laws and regs

■ IRS extends tax relief after storms hit Oklahoma counties

Businesses in three Oklahoma counties have until Aug. 31, 2023, to file various business tax returns and make tax payments. That's due to the severe storms, straight-line winds and tornadoes that tore through the state in April 2023. The impacted counties are:

- Cleveland
- McClain, and
- Pottawatomie.

The tax relief applies to quarterly payroll and excise tax returns normally due to the IRS on May 1, 2023, and July 31, 2023. Plus, penalties related to payroll and excise taxes will be abated if the deposits were made before May 4, 2023.

More info: bit.ly/oklahoma670

■ Scheduling law will soon take effect in Evanston, IL

On May 22, 2023, Evanston, IL, passed a new ordinance called the

Evanston Fair Workweek Ordinance, requiring employers to give adequate notice of work schedules, compensate employees for schedule changes, offer part-time employees increased work hours when available, arrange schedules with sufficient downtime between shifts and more. Only certain industries – e.g., hospitality, food service, retail, warehouse and manufacturing – are affected.

The ordinance takes effect Sept. 1, 2023.

More info: www.cityofevanston.org/government/ordinances

■ NYC law protects workers from height/weight discrimination

Effective Nov. 22, 2023, employers in New York City can't discriminate against employees on the basis of their height or weight. However, there are some exceptions.

The legislation expanding the New York City Human Rights Law was enacted on May 26, 2023.

More info: www.nyc.gov

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:

W-4: What changes did IRS make from 2022 to 2023?

Q: Now that the 2023 tax filing season has ended for employees, some of them need to fill out a new Form W-4 to adjust their withholding. Are there any differences between the 2022 and 2023 versions of the form?

A: Yes, the IRS made some minor changes to the form, so be sure to provide employees with the latest version if they ask to make adjustments. Here are a few highlights: In Step 1, the

phrase "qualifying widow(er)" has been switched to "qualifying surviving spouse." In Step 2, the first option about the estimator has been removed and the wording of the other two options has been tweaked. Step 3 has been renamed from "claim dependents" to "claim dependents and other credits." Plus, "add the amounts above and enter the total here" has been reworded to "add the amounts above for qualifying children and other dependents. You may add to this the amount of any other credits. Enter the total here."

More info: www.irs.gov/w4

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 publications contains Payroll-related updates.

- Publication 5227, *Annual Filing Season Program*. Revision date: April 2023. Posted date: 5/4/23.
- Publication 5792, *Small Businesses & Tax-Exempt Organizations: Beware of Tax Credit Scams!* Revision date: April 2023. Posted date: 5/4/23.
- Publication 5417 (sp), *Basic Security Plan Considerations for Tax Professionals (Spanish Version)*. Revision date: April 2023. Posted date: 5/4/23.
- Publication 5800, *Small Business/ Self-Employed Partnership Job Aid*. Revision date: April 2023. Posted date: 5/5/23.
- Publication 4772, *American Opportunity Tax Credit*. Revision date: May 2023. Posted date: 5/8/23.
- Publication 5719, *Information Returns Intake System Test Package for Information Returns*. Revision date: May 2023. Posted date: 5/11/23.
- Publication 5789, *Child and Dependent Care Credit*. Revision date: April 2023. Posted date: 5/17/23.
- Publication 5718, *Information Returns Intake System Electronic Filing Application to Application Specifications*. Revision date: May 2023. Posted date: 5/22/23.

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!

COLORADO

- **COVID-19:** The state recently announced the end date for the COVID Public Health Emergency (PHE) – May 11, 2023. Therefore, the PHE leave requirements ended June 8, 2023. **More info:** cdle.colorado.gov/hfwa

CONNECTICUT

- **MINIMUM WAGE:** Effective June 1, 2023, the state increased the minimum wage to \$15 per hour. That's up from \$14 per hour. The state began phasing in higher minimum wage rates in 2019, as the result of legislation passed in that year. **More info:** bit.ly/connecticut670

FLORIDA

- **E-VERIFY:** SB 1718, which will take effect July 1, 2023, requires private employers with 25 or more employees to use the E-Verify system. Documentation verifying new hires' employment eligibility must be kept for at least three years. If the E-Verify system is unavailable, an employer must document that – for example by retaining a screenshot which shows the lack of access. **More info:** www.flsenate.gov/Session/Bill/2023/1718

MARYLAND

- **NONCOMPETES:** The wage threshold employees must meet to be subject to noncompete agreements will soon change due to SB 591. Currently, such agreements can't be made with employees who earn \$15 per hour (\$31,200 annually) or less. Starting Oct. 1, 2023, the threshold will be

set at 150% of the state minimum wage rate. Note: The minimum wage is \$13.25. **More info:** legiscan.com/MD/text/SB591/2023

MICHIGAN

- **UNIONS:** Michigan became a right-to-work state in 2012, but now that the state has repealed its right-to-work law, employees in unionized workplaces will no longer be able to opt out of paying union dues and fees as required under collective bargaining agreements. The changes, brought about by SB 34, will take effect March 24, 2024. **More info:** bit.ly/michigan670

MINNESOTA

- **BREAK TIMES:** SF 3035, which takes effect July 1, 2023, expands the rules regarding break times for nursing mothers. Currently, breaks to express breast milk must be provided during the 12 months following the birth of a child, but the new law lifts that time limit. Another change? Now, break times for pumping must, if possible, run concurrently with break times already being provided. However, they "may run concurrently" according to SF 3035. Another provision the new law removes is one which exempts employers from providing the breaks if doing so would unduly disrupt the operations. **More info:** bit.ly/minnesota670
- **PAID FAMILY, MEDICAL LEAVE:** HF 2 became law on May 25, 2023, requiring paid family and medical leave starting in 2026. Employers will owe a premium of 0.7% of each employee's taxable wages, up to half of which (0.35%) may be charged to employees through wage deductions. Here's a timeline of what employers can expect. In 2024, you'll need to submit a wage detail report with details about quarterly wages received and hours worked for each

employee. In 2025, the state will provide notification language which you can use to notify employees about the program. In 2026, initial premium payments will be due. **More info:** mn.gov/deed/programs-services/paid-family

NEW YORK

- **BREAK TIMES:** A law requiring employers to provide expanded accommodations for employees to express breast milk took effect June 7, 2023. Among other things, the pumping spaces must be private and must include a flat surface, an electrical outlet and nearby access to running water. According to a previously existing law, if requested, an employee must allowed to take a break of at least 20 minutes every three hours. The break times don't need to be paid. **More info:** www.governor.ny.gov

THE LIGHTER SIDE

When you're busy tallying something, you never know what might throw off your numbers.

Consider what happened to a bakery in Avon, CT.

Employees at Taste by Spellbound had been loading cupcakes in a van, getting ready for a delivery.

That's when a bear showed up – a bear with a sweet tooth, no less.

He ran into the bakery's garage and picked up a box containing 60 cupcakes. Hurrying to the parking lot, he dug in.

Although the bear wasn't at all deterred by yelling, one employee drove his car close by and honked the horn until the furry, sugared-up inventory-wrecker left the scene.

Cite: UPI, "Bear Enters Garage of Connecticut Bakery, Steals 60 Cupcakes," 5/30/23.