

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™

**August 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

- **Aug. 16, 2023:** Deposit taxes for payroll on Aug. 9, 10, 11.
- **Aug. 18, 2023:** Deposit taxes for payroll on Aug. 12, 13, 14, 15.
- **Aug. 23, 2023:** Deposit taxes for payroll on Aug. 16, 17, 18.
- **Aug. 25, 2023:** Deposit taxes for payroll on Aug. 19, 20, 21, 22.
- **Aug. 30, 2023:** Deposit taxes for payroll on Aug. 23, 24, 25.
- **Sept. 1, 2023:** Deposit taxes for payroll on Aug. 26, 27, 28, 29.
- **Sept. 7, 2023:** Deposit taxes for payroll on Aug. 30, 31; Sept. 1.
- **Sept. 8, 2023:** Deposit taxes for payroll on Sept. 2, 3, 4, 5.

### MONTHLY DEPOSITORS

- **Aug. 15, 2023:** Deposit taxes for payments made during July 2023.
- **Sept. 15, 2023:** Deposit taxes for payments made during August 2023.

### ALL EMPLOYERS

- **Oct. 31, 2023:** File Form 941 for Q3. Note: If you properly deposited taxes on time and in full, you have until Nov. 13, 2023, to file.

## New procedure for inspecting employment eligibility docs

### ■ Form I-9 flexibility is available to E-Verify users

As of Aug. 1, 2023, employers have the option to inspect Form I-9 documents remotely instead of using the in-person method.

That's thanks to a procedure published in the *Federal Register* on July 25, 2023.

Important qualifier: Only businesses that participate in E-Verify can utilize the alternative procedure.

According to long-standing regs, employers have to examine Form I-9 documents submitted by a new hire within three business days of that person's first day of employment.

No changes there. However, the Dept. of Homeland Security (DHS) has amended the regs to provide flexibility with physical examination.

To use remote inspection, in addition to being enrolled in E-Verify, DHS says employers would:

- conduct a live video call with the employee to electronically examine their I-9 documents (and then retain clear and legible copies of those documents), and
- create an E-Verify case if the employee is a new hire.

### Annotating the form

On Form I-9, employers will need to annotate that they remotely inspected an employee's documents.

The process for doing that varies depending on what version of the

*(Please see Procedure ... on Page 2)*

## 403(b) plans can use form to ensure tax advantages

Want to ensure the retirement plan you're offering employees is a qualified plan? The IRS has updated the form used for that.

The reason for the update? Now individually designed 403(b) plans can request an IRS determination letter. In the past, only individually designed plans under IRC Sec. 401(a) – such as 401(k) plans – could do that.

The form now includes entries specific to 403(b) plans.

### According to plan sponsor's EIN

The instructions for Form 5300, *Application for Determination for*

*Employee Benefit Plan*, were revised in June 2023.

Given the changes, current sponsors can submit Form 5300 to request a determination regarding tax status.

To phase in the submissions, the IRS has created a schedule of when it'll start accepting the form. It's based on the last digit of the plan sponsor's employee identification number (EIN) as follows:

- 1, 2 or 3 – June 1, 2023
- 4, 5, 6 or 7 – June 1, 2024, and
- 8, 9 or 0 – June 1, 2025.

More info: [www.irs.gov/pub/irs-pdf/i5300.pdf](http://www.irs.gov/pub/irs-pdf/i5300.pdf)

## Employer paid \$1 extra per hour to workers who gave up OT rate

■ THEY SIGNED AN AGREEMENT, BUT DOL VIOLATIONS FOLLOWED

Even if someone agrees to an employment arrangement, a company can still be found in violation of the Fair Labor Standards Act (FLSA).

That's what Bauer Residential Inc. found out recently.

The Santa Maria, CA, company, which operates five residential care homes, offered \$1 extra per hour to employees.

In exchange, they signed an agreement that said they'd forego the overtime rate of one-and-a-half times the regular rate of pay.

Along with this, the company created a second payroll to hide the caregivers' overtime hours.

Plus, Bauer Residential broke the FLSA's recordkeeping provision by failing to keep accurate records of

hours worked – employees filled out more than one timesheet per pay period.

When the Dept. of Labor (DOL) discovered these FLSA violations, it said the company had to pay:

- \$545,655 in back wages and liquidated damages, and
- \$24,402 in civil money penalties for willful violations.

### Recordkeeping requirements

Under the FLSA, employers must maintain more than a dozen records for nonexempt workers.

No particular format is required.

Time sheets and the like must be kept for two years – payroll records, for three years.

**More info:** [www.dol.gov/newsroom/releases/whd/whd20230615](http://www.dol.gov/newsroom/releases/whd/whd20230615)

### Procedure ...

(continued from Page 1)

form you have. As the first step, check the bottom left of the form.

If the date says "10/21/19," you have the old version. If the date says "08/01/23," that's the new version (see related story, Page 3).

The next step is to:

- write "Alternative Procedure" in the Additional Information field of the old form, or
- put a check mark in the box found in the Additional Information field of the new form (to indicate use of an alternative procedure).

According to the *Federal Register* information, an employer can decide to offer the alternative procedure for remote hires only, while continuing to do physical inspections for on-site and hybrid employees.

Also, even if an employer would like employees to use the remote option, it can't force them to do so.

**More info:** [www.govinfo.gov/app/details/FR-2023-07-25/2023-15533](http://www.govinfo.gov/app/details/FR-2023-07-25/2023-15533)

## COMPLIANCE CHECK

### ■ MORE THAN \$1M OWED BY HEALTHCARE COMPANY

Your Comfort Zone Inc. d/b/a Comfort Zone, a West Lebanon, NH, home healthcare business, denied overtime wages to 36 home care workers. That cost the company:

- \$950,000 in back wages and liquidated damages
- \$50,000 in punitive damages, and
- \$36,324 in civil money penalties.

**More info:** [www.dol.gov/newsroom/releases/whd/whd20230711-1](http://www.dol.gov/newsroom/releases/whd/whd20230711-1)

### ■ DAILY FINES ACCRUING NOW UNTIL CONTRIBUTIONS PAID

Bicallis LLC, a Baltimore logistics, engineering and management support services company, failed to comply with a consent judgment and order to pay missing 401(k) plan contributions and interest. So, until that's taken care of, the company must pay:

- \$153,590 in missing contributions and interest, and
- \$100 per day in fines until the amounts are paid in full.

**More info:** [www.dol.gov/newsroom/releases/ebsa/ebsa20230711](http://www.dol.gov/newsroom/releases/ebsa/ebsa20230711)

### ■ MULTIPLE FLSA VIOLATIONS AT WISCONSIN EMPLOYER

Casa Tequila LLC, a restaurant in Pewaukee, WI, broke multiple provisions of the Fair Labor Standards Act (FLSA). The restaurant operated an illegal tip pool, failed to pay the proper overtime rate and allowed minors to work past 9 p.m. and for more than eight hours. That led to the restaurant owing:

- \$272,177 in back wages to 110 servers, cooks and other employees, and
- \$2,373 in civil money penalties.

**More info:** [www.dol.gov/newsroom/releases/whd/whd20230724](http://www.dol.gov/newsroom/releases/whd/whd20230724)

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## Form I-9 has been revamped - here's when its use will be mandatory

■ FORM AND INSTRUCTIONS ARE SHORTER IN LATEST REVISION

Make sure your company has the latest version of Form I-9, *Employment Eligibility Verification*, to give employees.

U.S. Citizenship and Immigration Services (USCIS) has revamped the form.

The new edition went into use on Aug. 1, 2023, but you can continue using the previous edition through Oct. 31, 2023.

### What's different

Here's a recap of the revisions USCIS has made:

- Two sections of the form have been condensed so they fit on a single page. They are Section 1, *Employee Information and Attestation*, and Section 2, *Employer or Authorized Representative Review and Verification*.
- The preparer/translator certification portion has been moved from Section 1 to a separate, standalone supplement. Employers can provide this to employees when necessary.
- Section 3, *Reverification and Rehire*, has been moved to a

standalone supplement. Employees can print this section if they need to reverify or rehire someone.

- The page that lists acceptable documents has been revised – some acceptable receipts have been added. Also, guidance and links to info on automatic extensions of employment authorization documentation are included.
- A checkbox has been added. Employers will need this to indicate when they've examined an employee's Form I-9 documentation remotely (*see related story, Page 1*).

Another change with this version is that the form can be fillable on a tablet or mobile device.

As for the form's instructions, USCIS has reduced them from 15 pages to eight.

Reminder: You don't need to ask current employees with a properly completed Form I-9 on file to fill out the new version of the form.

After all, unnecessary employment verification can lead to violations of the Immigration and Nationality Act's anti-discrimination provision.

**More info:** [www.uscis.gov/newsroom/alerts/uscis-to-publish-revised-form-i-9](http://www.uscis.gov/newsroom/alerts/uscis-to-publish-revised-form-i-9)

## Substantiating FSA expenses: 5 situations not allowed

Are employees submitting the proper documentation for their flexible spending arrangement (FSA) expenses, both for medical and dependent care?

Chief Counsel Advice 202317020 is a reminder that they should be.

### What IRS said

Otherwise, FSA reimbursements for unsubstantiated expenses should be included in gross income and counted as wages for FICA and FUTA purposes, the IRS said.

The IRS guidance listed several

situations that don't meet the requirements of a Sec. 125 plan:

- allowing employees to self-certify expenses
- sampling expenses
- not requiring the substantiation of *de minimis* expenses
- relying on favored providers – i.e., not requiring substantiation from certain doctors, etc., and
- using advance substantiation for a dependent care assistance program.

**More info:** [www.irs.gov/pub/irs-wd/202317020.pdf](http://www.irs.gov/pub/irs-wd/202317020.pdf)

## NEWS YOU CAN USE

### ■ MODEL FMLA FORMS EXPIRED JUNE 30, 2023

Are you using the most recent version of the Family and Medical Leave Act (FMLA) forms?

The Dept. of Labor's (DOL's) model forms should have an expiration date of June 30, 2026. That version replaced the previous one dated June 30, 2023.

Good news: You don't have any significant changes to take into account.

**More info:** [www.dol.gov/agencies/whd/fmla/forms](http://www.dol.gov/agencies/whd/fmla/forms)

### ■ IRS: E-FILING OF AMENDED RETURNS PLANNED FOR 2024

The push toward electronic filing continues. That's clear based on draft versions of two IRS forms:

- Form 8453-EMP, *E-file Declaration for Employment Tax Returns*, and
- Form 8879-EMP, *E-file Authorization for Employment Tax Returns*.

Both draft forms mention that, beginning in 2024, IRS plans to make e-filing amended tax returns available for the 940, 941-X, 943-X and 945-X forms. That could be done through Modernized e-File, the IRS explained.

**More info:** [www.irs.gov/draft-tax-forms](http://www.irs.gov/draft-tax-forms)

### ■ GROWTH IN NETWORK USED FOR EMERGENCY PAYROLLS

Same Day ACH payments grew during the first half of 2023, Nacha announced recently.

The value of the payments jumped to almost \$1.2 trillion (up 51.7% from the prior year). As for volume, that increased 13.7% to 385.6 million Same Day ACH.

The service, which utilizes the ACH Network, can be used for emergency and unscheduled payrolls and for other reasons.

**More info:** [bit.ly/payments674](https://bit.ly/payments674)

# Report looks at how IRS handled 2020 Social Security tax deferral

■ DUE DATE FOR EMPLOYEE AND EMPLOYER PORTION HAS PASSED

Did the IRS ensure that employers paid any Social Security tax payments they deferred in 2020?

That's what the Treasury Inspector General for Tax Administration (TIGTA) wanted to know.

Its findings were included in a May 22, 2023 report: *Recurring Identification Is Needed to Ensure That Employers Full Pay the Deferred Social Security Tax.*

## Billions in payments

As the report recapped, a provision in the Coronavirus Aid, Relief, and Economic Security (CARES) Act allowed the deferral of the employer portion of Social Security tax.

The CARES Act covered wages paid between March 27, 2020, and Dec. 31, 2020.

Later, the President expanded the deferral to include the employee portion of the tax only for wages paid during the third quarter of 2020.

One half of the deferred employer

portion had to be paid by Dec. 31, 2021, while the other half was due by Dec. 31, 2022. Note: The deadlines were adjusted due to holidays.

Meanwhile, the due date for the entire deferred employee portion was the end of 2021.

So, was the money paid?

Most of it (95%) was.

As of Feb. 23, 2023, IRS had received \$123 billion of the total \$129 billion in deferrals. Still, TIGTA had two recommendations, which the IRS agreed with:

1. *Tax accounts should be updated to reflect the correct balance due.* This recommendation stems from duplicate reversals of the tax being incorrectly processed, a problem that surfaced in self-employed individual tax accounts.

The IRS already corrected a 2022 programming error affecting 22,000 individual and business tax accounts, where payments of the deferral posted incorrectly as an additional deferral.

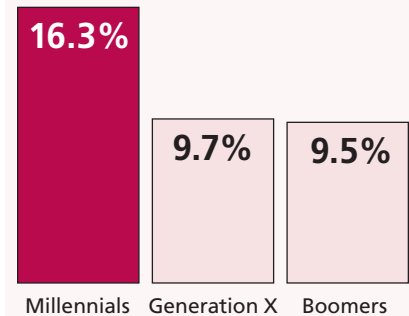
2. *The IRS should continue to identify new tax accounts with a Social Security tax deferral.*

Furthermore, the IRS should

## WHAT PAYROLL PROS TOLD US

### Contribution rates by generation

What is the average annual contribution rate to your retirement plan?



Millennials Generation X Boomers

Source: 2023 Natixis Survey of Defined Contribution Plan Participants

US Boomers, who are the closest generation to retirement, have the lowest retirement plan contribution rate. They're followed by Generation X and Millennials.

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

do this at least through 2024, TIGTA recommended.

The IRS said applicable modules with unpaid deferred Social Security tax would properly show the unpaid balances by June 15, 2025.

More info: [www.tigta.gov/sites/default/files/reports/2023-05/202346030fr.pdf](http://www.tigta.gov/sites/default/files/reports/2023-05/202346030fr.pdf)

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

### FLSA overtime dispute: Work orders revealed overtime hours worked

A company that sold and installed window blinds faced this real-life scenario:

The company hired three installers.

Because it'd classified them as independent contractors, it didn't track their hours worked.

Instead, workers received a flat fee, which didn't take into account time spent working or traveling to and from job sites. The workers started the day in the company's warehouse and headed to job sites in their own vehicles.

They also used their own tools.

The company didn't set their

schedules, and although workers' hours varied, they all said they put in around 70 hours per week.

Eventually, the installers sued for unpaid overtime under the Fair Labor Standards Act (FLSA). The company fought back, saying they couldn't substantiate their overtime claims.

The workers provided details about their usual work schedules, including daily starting and ending times. They had documentation, too: work orders they completed. The company didn't offer proof their start and end times differed from what they claimed.

Although a district court said the

workers didn't show they'd worked overtime, an appeals court disagreed and sent the case back down. Now the district court needs to determine if they were employees or independent contractors under the FLSA.

### Checklist for compliance

- Make sure your company clearly communicates with each worker upon hire so everyone is on the same page regarding that person's classification as an employee or an independent contractor.
- Consider what documentation your company has to support your classification decisions.

## Tracking local laws and regs

### ■ This Washington city now has its own minimum wage law

In Tukwila, WA, according to a new provision in the municipal code, the city must set a minimum wage, effective July 1, 2023.

As of that date, the hourly rates are:

- \$18.99 for large employers (those with more than 500 employees worldwide and certain franchisees), and
- \$16.99 for midsize employers (those with at least 15 but no more than 500 employees worldwide – or those with over \$2 million of annual gross revenue in the city).

Note: The rate for midsize employers is being phased in and will reach that of large employers, effective July 1, 2025.

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

### ■ Certain Long Beach, CA, workers see minimum wage increase

Employees who hold certain jobs in Long Beach, CA, must be paid a

higher minimum wage rate than most employees.

Here are the positions and rates, which increased on July 1, 2023:

- hotel workers – \$17.55 per hour (was \$16.73 per hour), and
- concessionaire workers – \$17.36 per hour (was \$16.55 per hour).

More info: [www.longbeach.gov/finance/business-info/compliance/minimum-wage](http://www.longbeach.gov/finance/business-info/compliance/minimum-wage)

### ■ Delayed! Lawsuits have put NYC delivery worker rule on hold

A new rule setting a minimum pay rate for app-based restaurant delivery workers in New York City has been postponed.

The rule would have taken effect July 12, 2023, with a rate of \$17.96 per hour, but that was delayed due to lawsuits, according to NYC Dept. of Consumer and Worker Protection.

More info: [www.nyc.gov/site/dcal/workers/workersrights/Delivery-Workers.page](http://www.nyc.gov/site/dcal/workers/workersrights/Delivery-Workers.page)

## 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: Are there best practices for avoiding retaliation?

**Q:** What are some best practices for preventing and addressing retaliation in the event employees bring Fair Labor Standards Act (FLSA) complaints?

**A:** Some examples of retaliation include termination, demotion, reduction of hours or rate of pay and shift changes. The Dept. of Labor (DOL) recently offered some ideas on how to avoid missteps when employees ask questions about their

rights or come forward with complaints under laws such as the FLSA. The DOL says to develop an anti-retaliation training for workers, managers and supervisors. Be sure you've established an internal complaint process to address violations of the law. It's also important to set up a system for receiving and responding to reports of retaliation. Plus, consider if oversight of your anti-retaliation program is effective.

More info: [blog.dol.gov/2023/04/28/best-practices-for-employers-to-prevent-and-address-retaliation](https://www.dol.gov/2023/04/28/best-practices-for-employers-to-prevent-and-address-retaliation)

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 and publications contains Payroll-related updates.

- Publication 5842, *Language Access for Taxpayers with Limited English Proficiency, Frequently Asked Questions*. Revision date: July 2023. Posted date: 7/17/23.
- Publication 5840, *Reasonable Accommodations for Taxpayers with Disabilities, Frequently Asked Questions*. Revision date: July 2023. Posted date: 7/17/23.
- Publication 3067, *IRS Disaster Assistance, Federally Declared Disaster Area*. Revision date: July 2023. Posted date: 7/19/23.
- Publication 5331, *Nonprofit Charitable and Other Tax-Exempt Organizations, Tax Year 2019*. Revision date: July 2023. Posted date: 7/25/23.
- Publication 5845, *Do You Need a New Employer Identification Number?* Revision date: July 2023. Posted date: 7/26/23.
- Publication 5682, *Records Control Schedules*. Revision date: July 2023. Posted date: 7/31/23.
- Form 14568, *Model VCP Compliance Statement*. Revision date: July 2023. Posted date: 8/1/23.
- Publication 1141, *General Rules and Specifications for Substitute Forms W-2 and W-3*. Revision date: July 2023. Posted date: 8/1/23.

### 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

- **EXPENSE REIMBURSEMENT:** Your company may need to reimburse employees for expenses incurred while working from home. That's the upshot of a July 11, 2023, California court of appeal decision. In *Thai v. International Business Machines Corp.*, the court said the employer had to reimburse employees for services and equipment they purchased to work from home during the pandemic. It didn't matter that remote work was required under the governor's stay-at-home mandate, the court ruled. **More info:** [tinyurl.com/california674](https://tinyurl.com/california674)

### IDAHO

- **WITHHOLDING:** The State Tax Commission has updated the income tax withholding tables for 2023. That's because legislation (HB 172) has lowered the tax rate and decreased the number of tax brackets. There's no need to adjust withholding back to the beginning of 2023, but make sure you're using the revised tables that reflect the 5.8% rate. Also note that the State Tax Commission made a withholding table correction on May 18, 2023. **More info:** [tax.idaho.gov/pressrelease/withholding-tables-updated-for-2023](https://tax.idaho.gov/pressrelease/withholding-tables-updated-for-2023)

### INDIANA

- **INCOME TAX:** SB 419 provides that if a non-resident receives compensation for working in the state for 30 days or less during the calendar year, that person is exempt from state income tax. Another provision of the law says that penalties for failure to deduct

and pay income taxes can't be assessed if the employer relied on either 1) a time and attendance system designed to allocate wages among all taxing jurisdictions where the employee works or 2) an employee's annual determination of time that he or she expected to spend performing duties in the state. The provisions take effect Jan. 1, 2024. **More info:** [iga.in.gov/legislative/2023/bills/senate/419/details](https://iga.in.gov/legislative/2023/bills/senate/419/details)

### NEW JERSEY

- **UNEMPLOYMENT INSURANCE:** AB 4772 changes the terms for employees who can receive unemployment insurance (UI) benefits. Currently, workers participating in labor disputes, such as strikes, are prevented from accessing UI benefits. Now under the legislation, benefits can be paid to workers during an employer lockout even if a strike did not immediately precede the lockout, for example. **More info:** [www.nj.gov/governor/news/news/562023/approved/20230424a.shtml](https://www.nj.gov/governor/news/news/562023/approved/20230424a.shtml)

### NORTH DAKOTA

- **ACCOMMODATIONS:** As spelled out in HB 1450, which took effect Aug. 1, 2023, "pregnant" means pregnancy, child birth and related medical conditions. That's relevant because that state's code says it's discriminatory for an employer to fail to make reasonable accommodations to an otherwise qualified employee because that person is pregnant. **More info:** [legiscan.com/ND/bill/HB1450/2023](https://legiscan.com/ND/bill/HB1450/2023)

### OKLAHOMA

- **ELECTRONIC FILING:** Employers must file annual reconciliation returns to the Tax Commission electronically. Now, failure to do within 30 days of the due date may result in a penalty of up to \$1,000. The change took effect

July 1, 2023, and is the result of HB 2289. **More info:** [tinyurl.com/oklahoma674](https://tinyurl.com/oklahoma674)

### WASHINGTON

- **CHILD SUPPORT:** HB 1262 says that if you receive a child support order for an employee, then you'll need to report lump sum payments to the Division of Child Support. The legislation defines lump sum payments as income other than periodic, recurring payments on regular paydays. Lump sum payments include but aren't limited to discretionary and nondiscretionary bonuses, commissions, performance bonuses, merit increases, safety awards, signing bonuses, moving and relocation incentive payments, holiday pay, termination pay and severance pay. **More info:** [www.dshs.wa.gov/esa/division-child-support](https://www.dshs.wa.gov/esa/division-child-support)

## THE LIGHTER SIDE

The requirements under state child labor laws will change when the summer ends and students go back to school.

Or is it: back to "shcool"?

In Massachusetts, one town was getting its roads ready for students' return by painting a reminder on the pavement about maintaining a safe driving speed.

"Slow shcool," the sign read.

Weather conditions in the Town of Holden prevented contractors from quickly fixing the typo near Mountview Middle School.

But, joking in a Facebook post, the town said it'd figured out how to deal with the misspelled word: changing the school's sign to read, "Mountview Middle Shcool."

**Cite:** UPI, 'SCHOOL' Misspelled as 'SHCOOL' on Massachusetts Road, 7/28/23.