

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™

September 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

- **Sept. 15, 2023:** Deposit taxes for payroll on Sept. 9, 10, 11, 12.
- **Sept. 20, 2023:** Deposit taxes for payroll on Sept. 13, 14, 15.
- **Sept. 22, 2023:** Deposit taxes for payroll on Sept. 16, 17, 18, 19.
- **Sept. 27, 2023:** Deposit taxes for payroll on Sept. 20, 21, 22.
- **Sept. 29, 2023:** Deposit taxes for payroll on Sept. 23, 24, 25, 26.
- **Oct. 4, 2023:** Deposit taxes for payroll on Sept. 27, 28, 29.
- **Oct. 6, 2023:** Deposit taxes for payroll on Sept. 30 for Q3.
- **Oct. 6, 2023:** Deposit taxes for payroll on Oct. 1, 2, 3 for Q4.

### ■ MONTHLY DEPOSITORS

- **Sept. 15, 2023:** Deposit taxes for payments made during August 2023.
- **Oct. 16, 2023:** Deposit taxes for payments made during September 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.

## DOL's plan: Increase exempt salary floor to \$55K annually

■ Bonuses and incentive pay can count toward 10%

The Dept. of Labor (DOL) has disclosed the base number it thinks employers should pay “white collar” workers to classify them as exempt from overtime: \$55K annually.

That’s more than a 50% increase from \$35,568, the salary threshold that’s been in place since 2019.

So, if the rule is finalized, some exempt folks would see their weekly earnings jump from \$686 to \$1,059.

Up to \$105.90 of that weekly amount could come from nondiscretionary bonuses and incentive pay. Reason: Employers will still be able to satisfy up to 10% of the salary level through such payments.

Meanwhile, if employers don’t want to be forced into dishing out

raises, workers could learn they’ve been reclassified as hourly, meaning Payroll would have to ensure those employees track their hours worked.

There are other ways employers might choose to deal with a dramatic shift in the exempt salary floor, such as letting some employees know they’ll receive their final paycheck.

### Additional changes

The proposed rule, published on Sept. 8, 2023, in the *Federal Register*, includes several other changes to the Fair Labor Standards Act (FLSA) regs.

Keep in mind the rule needs to go through a 60-day comment period before being finalized, but here’s a

*(Please see Salary floor ... on Page 2)*

## Rothification provision on hold for 2 years, says IRS

Employers now have a two-year administrative transition period with respect to “Rothification,” the IRS said during its September Payroll Industry Call.

Rothification refers to a provision in the Secure 2.0 Act requiring that catch-up contributions made on behalf of certain participants be designated as Roth contributions. Specifically, the provision – found in Sec. 603 of the Secure 2.0 Act – affects employees age 50 or older whose FICA wages for the prior calendar year exceed \$145K.

The delay is welcome news – many businesses have been concerned about being able to implement the new

requirements by the original Jan. 1, 2024, effective date. Now, employers have until Jan. 1, 2026.

### Guidance on Secure 2.0 Act

As the IRS also noted during the call, it’s considering releasing further guidance on Sec. 603.

That might include clarification on how to handle individuals who didn’t earn any FICA wages in the preceding year – some state and local government employees would be in that situation, as would F-1 and other visa holders.

More info: [bit.ly/roth676](https://bit.ly/roth676)

## Company gave out annual bonuses, didn't count them in OT calculations

■ HEALTHCARE PRACTICE IN FLORIDA OWED \$244,011, DOL DETERMINED

Providing bonuses to employees can be good for morale, but do they know about and expect the bonuses?

If so, the amounts will need to be included in overtime calculations.

A healthcare practice in Orlando failed to take that step when it awarded annual nondiscretionary bonuses to workers at four of its sites in Florida.

That wasn't the only Fair Labor Standards Act (FLSA) violation that the Dept. of Labor (DOL) found at Orlando Health Medical Group Inc.

In addition, employees arrived at work before their scheduled shift times or stayed after the end of their shift – and the company didn't pay them for that time worked.

Plus, the medical practice didn't keep complete and accurate records

of hours worked, the DOL determined during an investigation.

All told, the employer had to pay 49 workers \$244,011 in back wages and liquidated damages.

### Regular rate of pay

Remind others that Payroll needs to be in the loop regarding types of bonuses. For example, bonuses are nondiscretionary – and should be included in the regular rate of pay – if they're:

- based on a predetermined formula
- for quality or quantity of work
- announced to employees to push them to work more efficiently
- for attendance, or
- based on safety achievements.

More info: [www.dol.gov/newsroom/releases/whd/whd20230123](http://www.dol.gov/newsroom/releases/whd/whd20230123)

### Salary floor ...

(continued from Page 1)

look at what the DOL has rolled out:

- **Higher threshold for highly compensated employees (HCEs).** The proposed rule calls for a hefty increase to the amount HCEs must be paid, with the threshold going from \$107,432 to \$143,988.
  - **Automatic updating mechanism.** The DOL believes the standard salary level for executive, administrative and professional employees should be updated every three years. Likewise, so should the HCE annual compensation threshold, according to the DOL.
  - **Elimination of special salary levels for four U.S. territories.** That'd impact employers in Puerto Rico, Guam, the U.S. Virgin Islands and the Commonwealth of the Northern Mariana Islands.
  - **Increase in American Samoa's special salary level.** The DOL wants to raise it from \$380 to \$890 weekly.
- More info: [bit.ly/exempt676](http://bit.ly/exempt676)

## COMPLIANCE CHECK

### ■ CALIFORNIA CONTRACTOR OWED MORE THAN \$350K

Watkins Environmental, an environmental remediation and demolition contractor in San Diego, violated the Fair Labor Standards Act when it didn't pay employees for time spent before their shifts preparing for jobs and attending required training. That led to minimum wage and overtime problems. Plus, Watkins didn't have accurate and complete employee records. That cost the company:

- \$28,462 in civil money penalties
- \$181,722 in back wages, and
- \$181,722 in liquidated damages.

More info: [www.dol.gov/newsroom/releases/whd/whd20230523](http://www.dol.gov/newsroom/releases/whd/whd20230523)

### ■ FIRST RESPONDERS DIDN'T RECEIVE OVERTIME PAY

The City of Gary in Indiana failed to pay overtime to some of its first responders when their hours exceeded 106 in two weeks. The workers sometimes put in 120 hours during the 14-day period. So, the city had to pay:

- \$319,237 in back wages to 154 firefighters, and
- \$353,265 in back wages to 18 paramedics.

More info: [www.dol.gov/newsroom/releases/whd/whd20230502-1](http://www.dol.gov/newsroom/releases/whd/whd20230502-1)

### ■ EMPLOYEES' CONTRIBUTIONS WITHHELD, NOT FORWARDED

Owen Software Development Co. Ltd.'s 401(k) plan in Rockville, MD, withheld retirement plan contributions from employees' pay but didn't forward the money in a timely manner to its 401(k) plan.

The company must restore \$11,130 in missing contributions plus interest and penalties.

More info: [www.dol.gov/newsroom/releases/ebsa/ebsa20230807-0](http://www.dol.gov/newsroom/releases/ebsa/ebsa20230807-0)



EDITOR: JENNIFER WEISS  
[jweiss@HRMorning.com](mailto:jweiss@HRMorning.com)  
 MANAGING EDITOR: CURT BROWN  
 PRODUCTION EDITOR: P.J. FRONZEO  
 EDITORIAL DIRECTOR: CURT BROWN

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## Protective gear and time worked: What federal appeals court said

■ CREW MEMBERS WHO WORKED ON OIL RIG BROUGHT FLSA LAWSUIT

Do employees need to be paid for time spent putting on and taking off their safety gear?

That common Fair Labor Standards Act (FLSA) question has popped up again in the courts, this time in the Third Circuit Court of Appeals.

In *Tyger v. Precision Drilling Corp.*, the federal appeals court ruled that the lower court had applied the wrong test when it decided employees didn't need to be paid for donning and doffing protective clothing. So, it sent the case back to the federal district court for a trial. Here are the details:

Rig hands – i.e., crew members on an oil rig – had to wear protective gear each day including:

- flame-retardant coveralls
- steel-toed boots
- hard hats
- safety glasses
- gloves, and
- earplugs.

The rig hands thought they should be paid for time spent getting into and out of protective clothing. But according to the employer, it wasn't

required to pay the workers for time spent doing those preliminary and postliminary activities. After all, the employer argued, they weren't integral and indispensable to the workers' principal activities.

### Integral and indispensable

The court looked closely at what makes an activity integral to a principal activity. That includes:

- **Location.** Employees may put on safety gear once in the workplace. If they don't have a meaningful option to change into gear at home, it makes sense to say donning and doffing is integral.
- **Regulations.** When regs require the protective gear, that suggests that the changing is integral.
- **Type of gear.** The more specialized the gear, whether required by regs or the nature of the work, the more likely time spent changing into/out of the protective gear is integral.

As for whether an activity is indispensable, the Supreme Court has ruled it doesn't need to be strictly necessary. Rather, the activity should be reasonably necessary.

**More info:** [casetext.com/case/tyger-v-precision-drilling-corp-11](http://casetext.com/case/tyger-v-precision-drilling-corp-11)

## Do your substitute Forms W-2 meet the IRS specs?

The IRS has released the info you'll need if your company plans to utilize substitute Forms W-2 for TY 2023 – whether they're produced in-house or by a third party.

After all, you don't have to order printed copies of the forms from the IRS, but you do have to ensure that the forms meets the specs. Here's a quick look:

### Details in Publication 1141

Publication 1141, *General Rules and Specifications for Substitute Forms W-2 and W-3*, was revised

in July of 2023. The "What's new" section includes a recap of the new electronic filing requirements.

Beginning with tax year 2023, the threshold for mandatory electronic filing has been lowered from 250 returns of one kind to 10 aggregate returns. With that in mind, confirm if you're still able to use printed copies of W-2s to SSA.

Also remember that if you e-file W-2s, you don't submit a paper W-3, Publication 1141 explains.

**More info:** [www.irs.gov/pub/irs-irbs/irb23-31.pdf](http://www.irs.gov/pub/irs-irbs/irb23-31.pdf)

## NEWS YOU CAN USE

### ■ HERE'S A HEADS-UP FOR SEMI-WEEKLY DEPOSITORS

If you're a semi-weekly tax depositor, make a note of this date: Oct. 6, 2023. You may need to send the IRS two separate deposits.

Deposits will be due for the:

- third quarter (to cover payments made on Saturday, Sept. 30), and
- fourth quarter (to cover payments made on Sunday, Oct. 1; Monday, Oct. 2; and Tuesday, Oct. 3).

**More info:** [www.irs.gov/pub/irs-pdf/p509.pdf](http://www.irs.gov/pub/irs-pdf/p509.pdf)

### ■ FOR 2024, IRS DECREASES AFFORDABILITY PERCENTAGE

What makes premiums for health coverage affordable for purposes of the Affordable Care Act (ACA)?

Currently, it's if they're 9.12% of an employee's household income. But in 2024, that percentage will decrease significantly.

In Revenue Procedure 2023-29, the IRS said the percentage will drop to 8.39%.

**More info:** [www.irs.gov/pub/irs-drop/rp-23-29.pdf](http://www.irs.gov/pub/irs-drop/rp-23-29.pdf)

### ■ DEADLINE FOR RESOLVING NAME/SSN MISMATCHES

Some employees whose names and Social Security numbers (SSNs) didn't match – when the information was checked in E-Verify upon hire – were given extra time to resolve the mismatch with SSA. That was due to the COVID-19 pandemic.

Now, the final date for them to resolve those previously referred mismatches is Sept. 29, 2023, E-Verify explained. Cases that aren't resolved will automatically get a Final Nonconfirmation.

Remember, if the result of a case is Final Nonconfirmation, you'll need to close the case and provide additional information to E-Verify.

**More info:** [bit.ly/mismatch676](http://bit.ly/mismatch676)

## Thriving? Loud quitting? Here's what workers revealed in 2023 survey

■ STRESS WAS A MORE COMMON EMOTION THAN ANGER

You may wonder what employees in your workplace are thinking and how they stack up to workers in other places of employment.

A new survey from Gallup, *State of the Global Workplace 2023 Report*, provides insight.

In the U.S. and Canadian region, 31% of those surveyed said they're thriving at work, meaning they're engaged. Here's how that breaks down: More women (33%) than men (29%) reported being engaged at work.

As for work location, exclusively remote employees and hybrid employees were equally likely to say they're thriving (35%), which was higher than those working on-site (27%).

Meanwhile, 52% of all those surveyed put themselves in the quiet quitting category, meaning they're not engaged at work, while 17% admitted to being actively disengaged – i.e., they've taken up loud quitting.

In response to a question about

whether participants had experienced a lot of stress the day prior, 52% of them answered yes.

Women reported stress more than men did – 57% versus 48%.

When it comes to work location, hybrid employees are the most stressed-out group (55%), while 53% of both exclusively remote and on-site employees said yes to that.

Anger isn't as problematic, with 18% stating they experienced a lot of anger the day prior.

### Looking for another job?

The Gallup survey asked to what extent workers were looking for a different job. Almost half – 47% – said they were watching for or actively seeking a new job.

Employees younger than 40 years old were scoping out job opportunities more than employees age 40 or older, at 56% and 40%, respectively.

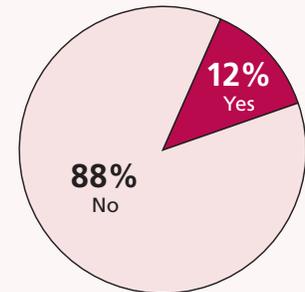
There wasn't much difference between men (48%) and women (46%), the surveyed showed.

In a related question, both genders equally agreed (71%) that it was a

## WHAT PAYROLL PROS TOLD US

### Health savings accounts

If you have a health savings account, are you investing in it for future growth?



Source: Bank of America Q2 2023 Participant Pulse

According to data from Q2, only 12% of individuals who hold health savings accounts are investing for future growth, with more men (18%) than women (11%) doing so.

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

good time, based on the area where they lived, to job hunt.

Also agreeing were 75% of workers age 40 or older. But the sentiment was less strong – 66% – among employees younger than that.

**More info:** [www.gallup.com/workplace/349484/state-of-the-global-workplace.aspx](http://www.gallup.com/workplace/349484/state-of-the-global-workplace.aspx)

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

### Company paid salesman \$208,721.58 in commission - he expected \$461,278.56

A computer software company in Massachusetts faced this real-life scenario:

An employee who'd worked as a salesperson for six years received a base salary plus commissions as his compensation. He'd signed two agreements, which the company revised periodically, regarding his commissions. The first was an individualized plan – the second, the terms and conditions of the plan.

The terms-and-conditions agreement became a point of contention between the salesman and the employer when he received less commission than he'd been

anticipating for two deals the company closed. For the first deal, he thought he should be paid \$32,124.99 in commission – he received \$0. As for the second deal, the employee tallied up his commission at \$429,153.57, but the company scaled the amount back to \$208,721.58.

The matter ended up in court.

Despite having signed the agreement, the employee argued that he was owed the money under the Massachusetts Wage Act.

A federal district court and later a federal appeals court said the commissions weren't wages under

state law because the amounts weren't "definitely determined" and hadn't become "due and payable." After all, according to the terms-and-conditions agreement, commissions were earned once certain requirements had been met. One requirement was that the employer would adjust commissions for exception transactions – e.g., those involving high dollar amounts.

### Checklist for compliance

- If your company revises its commission agreements, be sure employees sign off on the changes.
- Review what your state's wage law says about commission payments.

## Tracking local laws and regs

### ■ Another locality passes minimum wage ordinance

A new ordinance recently passed in Edgewater, CO, establishing a minimum wage. Employers with one or more employees will need to pay at least:

- \$15.02 by Jan. 1, 2024
- \$16.52 by Jan. 1, 2025
- \$18.17 by Jan. 1, 2026
- \$19.99 by Jan. 1, 2027, and
- \$21.99 by Jan. 1, 2028.

More info: [tinyurl.com/colorado676](http://tinyurl.com/colorado676)

### ■ First a hurricane, then fires, now tax relief for California counties

On Aug. 21, 2023, the California Employment Development Dept. announced that employers directly affected by Hurricane Hilary could request up to a two-month extension to file payroll reports and deposit payroll taxes. That applied to the following counties: Fresno, Imperial,

Inyo, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Tulare and Ventura.

In a separate announcement, on Aug. 31, 2023, the department offered the two-month extension to employers that'd been directly affected by fires in Del Norte and Siskiyou counties.

More info: [edd.ca.gov/en/Payroll\\_Taxes/Payroll\\_Taxes\\_News](http://edd.ca.gov/en/Payroll_Taxes/Payroll_Taxes_News)

### ■ Extra time for tax responsibilities in Cook County, IRS announces

The IRS offered tax relief to employers located in Cook County, Illinois, following severe storms and flooding that occurred June 29, 2023. Returns and taxes due from that date through Oct. 31, 2023, can be filed and paid by the end of October.

Also, the IRS said it'll abate penalties on payroll and excise tax deposits due from June 29, 2023, to July 14, 2023, as long as they were paid by the latter date.

More info: [tinyurl.com/illinois676](http://tinyurl.com/illinois676)

## 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:*

### What's the new way to access Business Services Online (BSO)?

**Q:** I'm having trouble logging into BSO to prepare for year-end. What's changed?

**A:** In March 2023, SSA updated the process employers use to access their BSO accounts. SSA reviewed the new procedures and offered some tips during the September IRS Payroll Industry Call. It's important to know that if you click "Account" in the top right corner of the BSO welcome page, that'll take you to a login

page for personal accounts, not BSO. SSA explained that before using BSO for the first time after March 23, 2023, you'll need to verify your identity by logging in with: 1) a "my Social Security" account that was created before Sept. 18, 2021, 2) an existing [Login.gov](http://Login.gov) account, or 3) an existing [ID.me](http://ID.me) account. Note: You may need to create one of those accounts. SSA also shared this update: If you have questions related to registering your BSO account, you should call SSA's National 800 Number (800-772-1213).

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

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 other publications contains Payroll-related updates.

- Publication 5248, *IRS Form 990-N Electronic Filing System (e-Postcard)*. Revision date: August 2023. Posted date: 8/10/23.
- Form W-3C (PR), *Transmittal of Corrected Wage and Tax Statements (Puerto Rico Version)*. Revision date: August 2023. Posted date: 8/16/23.
- Publication 5851, *New Parents Check Eligibility for These Tax Credits and Deductions*. Revision date: August 2023. Posted date: 8/17/23.
- Publication 5354, *Criminal Tax Bulletin*. Revision date: August 2023. Posted date: 8/17/23.
- Publication 5651, *Still Need to File a 2022 Tax Return?* Revision date: July 2023. Posted date: 8/17/23.
- Publication 1136, *Statistics of Income Bulletin*. Revision date: August 2023. Posted date: 8/28/23.
- Publication 5855, *Prevailing Wage & Registered Apprenticeship Overview*. Revision date: July 2023. Posted date: 8/29/23.
- Publication 5252, *eLevy Flyer*. Revision date: August 2023. Posted date: 8/31/23.
- Publication 5832, *Energy Efficient Commercial Buildings Deduction*. Revision date: August 2023. Posted date: 9/1/23.

### 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

- **DATA SECURITY:** The Superior Court of California issued a temporary ruling delaying enforcement of regs under the California Privacy Rights Act (CPRA). The regs took effect March 29, 2023. Enforcement would have begun over the summer, but due to a lawsuit brought by the California Chamber of Commerce, enforcement won't begin until March 29, 2024. The CPRA amends and extends the California Consumer Privacy Act. **More info:** [coppa.ca.gov/regulations](http://coppa.ca.gov/regulations)

### INDIANA

- **WITHHOLDING:** The Indiana Dept. of Revenue (DOR) updated Departmental Notice #1 on Sept. 15, 2023, with information about the additional exemption for dependents claimed for the first time. That exemption can be found on line 7 of Form WH-4, *Employee's Withholding Exemption and County Status Certificate*. Table B should be used to figure the exemption, the DOR explained in the notice. **More info:** [www.in.gov/dor/files/dn01.pdf](http://www.in.gov/dor/files/dn01.pdf)

### MAINE

- **PAID LEAVE:** The state has established a paid family and medical leave insurance fund. Starting Jan. 1, 2025, employers will need to remit contribution reports and premiums for each employee. An employer that has 15 or more employees can deduct up to 50% of the premium from an employee's wages and also must pay the remaining percentage. An employer that has fewer than

15 employees doesn't have to pay the employer portion but must withhold and remit the employee portion (which is 50% of the premium). Employees can start taking the paid leave in 2026, with 12 weeks available to them. They can take intermittent leave – in increments of at least eight hours – or reduced-schedule leave. Note: An employer that has an approved private plan won't be required to remit premiums. **More info:** [tinyurl.com/maine676](http://tinyurl.com/maine676)

### NEVADA

- **TAXES:** The Modified Business Tax was decreased as of July 1, 2023. The new rate is 1.17% for general businesses (was 1.378%). Financial institutions and mining businesses have a rate of 1.554% (was 1.853%). The tax applies for wages that exceed \$50,000 per quarter. **More info:** [tax.nv.gov/FAQs/Modified\\_Business\\_Tax\\_Rate\\_Reduction](http://tax.nv.gov/FAQs/Modified_Business_Tax_Rate_Reduction)

### NEW JERSEY

- **TAXES:** AB 4694 addresses nonresidents of New Jersey working in the state. The legislation says that if the employee's state of residence uses a "convenience of employer" test to determine the source of the income, then the same test will apply in New Jersey. The bill was enacted on July 21, 2023, and is retroactive to Jan. 1, 2023. **More info:** [legiscan.com/NJ/text/A4694/2022](http://legiscan.com/NJ/text/A4694/2022)

### RHODE ISLAND

- **STATE HOLIDAY:** The state has established Juneteenth National Freedom Day as an official state holiday starting in 2024. That's due to S0444A. The holiday will be celebrated on June 19 each year, but if that date falls on a Saturday or Sunday, Juneteenth will be celebrated on the following Monday. Note: Juneteenth became

a federal holiday in 2021. **More info:** [tinyurl.com/ri676](http://tinyurl.com/ri676)

### VERMONT

- **TAXES:** A new payroll tax, the Child Care Contribution, will be imposed on employers and employees due to H 217. Although the governor vetoed the bill, the legislature overrode the veto. As a result, on July 1, 2024, the tax will go into effect. The contribution rate will be 0.44% of an employee's covered wages (0.11% for self-employed individuals). Employers are responsible to remit the tax but can choose to withhold up to 25% – i.e., 0.11% – of the required contributions from an employee's wages. Employers should plan to start making payments to the Vermont Dept. of Taxes next year. **More info:** [legislature.vermont.gov/bill/status/2024/H.217](http://legislature.vermont.gov/bill/status/2024/H.217)

## THE LIGHTER SIDE

Have you thought about increasing security measures to protect assets at your company?

You could take a lesson from Eastern Forest Nursery in Australia, which recently had to deal with some recurring theft.

The nursery couldn't figure out who – or what – had been stealing its plants.

Eventually, it identified an unexpected culprit: a koala bear. He'd taken \$3,800 worth of trees and eaten them.

Claude, as the nursery named him, finally got caught the day he overate and became too drowsy to flee the scene. Employees wrapped him up and let him rest under a tree.

The next order of business? Installing a koala-proof fence.

**Cite:** UPI; "Koala Steals \$3,800 Worth of Plants from Nursery"; 9/6/23.