

The most current information on how Payroll professionals can avoid legal and procedural pitfalls, in a fast-read format, twice a month.

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October 1, 2023

UPCOMING DEADLINES

Use this checklist to help ensure your deposits of Social Security, Medicare and withheld income taxes are timely remitted to the IRS.

■ SEMIWEEKLY DEPOSITORS

- **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.
- **Oct. 12, 2023:** Deposit taxes for payroll on Oct. 4, 5, 6.
- **Oct. 13, 2023:** Deposit taxes for payroll on Oct. 7, 8, 9, 10.
- **Oct. 18, 2023:** Deposit taxes for payroll on Oct. 11, 12, 13.
- **Oct. 20, 2023:** Deposit taxes for payroll on Oct. 14, 15, 16, 17.
- **Oct. 25, 2023:** Deposit taxes for payroll on Oct. 18, 19, 20.

■ MONTHLY DEPOSITORS

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

Check out the new federal per diem rates for FY 2024

■ GSA also updated its list of counties

The federal per diem rates that employers can use to reimburse employees for business expenses have been released for FY 2024.

Of course, if employers exceed those rates, that leads to something nobody wants – not employees, not A/P, not Payroll. Specifically, Payroll will need to include the average amounts in employees' income and withhold employment taxes.

With that in mind, here's the latest update from the General Services Administration (GSA), so you can avoid tax headaches:

Rates take effect in October

Most counties – about 2,600 – in the continental United States

(CONUS) are covered by the standard per diem rate. Starting Oct. 1, 2023, the CONUS rate is \$166 (up from \$157), including a:

- \$107 rate for lodging (was \$98), and
- \$59 rate for meals and incidental expenses – unchanged.

This fiscal year, 302 locations are non-standard areas (NSAs), down from 316 last year.

These are no longer NSA locations:

- Hammond/Munster/Merrillville, IN (Lake Co.)
- Wichita, KS (Wichita Co.)
- Baton Rouge, LA (East Baton Rouge Parish)

(Please see Per diem ... on Page 2)

What's the reaction to DOL's proposed overtime rule?

The Dept. of Labor (DOL) is taking comments on its proposed overtime rule. If the rule is finalized as is, the salary floor for classifying someone as exempt will increase from \$35,568 per year to \$55,068.

The comment period opened on Sept. 8, 2023 – the same day as the rule's posting in the *Federal Register* – and it'll close on Nov. 7, 2023. If businesses react as they did with past overtime rules, thousands of comments may be submitted.

Comments already submitted

Here's a paraphrase of some comments the DOL has received

so far regarding its proposed rule – they come from a variety of industries:

- a 50% increase in the salary floor is too drastic – any increases should be gradual
- the cost of living varies by region, and so should the salary floor
- employers that can't afford to issue raises will be forced to make staff reductions, and
- it's the wrong time for an increase as businesses are still recovering from pandemic restrictions.

More info: www.regulations.gov/docket/WHD-2023-0001/comments

CEO withdrew \$300K from ESOP fund to pay for business expenses

■ PLUS, BENEFICIARY WHO ASKED FOR DISTRIBUTION DIDN'T GET IT

As with other types of retirement plans, employee stock ownership plans (ESOPs) can provide tax benefits to employers – e.g., the deduction of up to 25% of covered payroll.

Of course, sponsoring an ESOP also comes with a lot of responsibilities. Recently, one commercial construction contractor that sponsored an ESOP failed in a big way to meet its responsibilities.

The company's CEO was also the trustee of the retirement plan. During 2021 and 2022, when money got tight for the Farmington, UT, company, he dipped into the plan's employee retirement fund to pay the company's business expenses.

In fact, he took \$300,000 worth of funds that belonged to employees who worked at Ascent Construction Inc. Plus, he failed to give \$30,000

to a beneficiary who had requested a distribution from the ESOP.

As the Dept. of Labor's (DOL's) Employee Benefits Security Administration (EBSA) was conducting its investigation in 2023, the CEO again attempted to withdraw retirement funds. So, the EBSA asked for and obtained a preliminary injunction to get him removed as trustee.

Good faith, fair market value

Heads up: ESOPs have been in the spotlight lately.

For example, the Secure 2.0 Act required the DOL to establish acceptable standards and procedures so that when shares of a business are acquired by an ESOP, a good faith, fair market value is in place.

More info: www.dol.gov/newsroom/releases/ebsa/ebsa20230801

Per diem ...

(continued from Page 1)

- Baltimore County, MD
- Frederick, MD (Frederick Co.)
- East Lansing/Lansing, MI (Ingham and Eaton Cos.)
- Kalamazoo/Battle Creek, MI (Kalamazoo and Calhoun Cos.)
- Egan/Burnsville/Mendota Heights, MN (Dakota Co.)
- Akron, OH (Summit Co.)
- Wooster, OH (Wayne Co.)
- Erie, PA (Erie Co.)
- Corpus Christi, TX (Nueces Co.)
- Round Rock, TX (Williamson Co.)
- Appleton, WI (Outagamie Co.)
- Brookfield/Racine, WI (Waukesha and Racine Cos.), and
- Morgantown, WV (Monongalia Co.)

These counties have been added as NSAs for FY 2024:

- Huntsville, AL (Madison Co.), and
- Charles Town, WV (Jefferson Co.).

More info: bit.ly/perdiem677

COMPLIANCE CHECK

■ HOTEL DENIED FMLA LEAVE, OWED \$7K IN BACK WAGES

Hotel De Panache LLC, operating as Home 2 Suites in Shreveport, LA, denied leave under the Family and Medical Leave Act (FMLA) and then fired the individual who'd requested the leave.

The employer has now received training on the FMLA and also paid \$7,105 in back wages.

More info: www.dol.gov/newsroom/releases/whd/whd20230807

■ OVERTIME TROUBLE FOR TX HEALTHCARE PROVIDER

San Lorenzo Adult Provider and Pediatrics, a home healthcare and hospice service provider in El Paso, TX, didn't pay the correct amount of overtime to 133 employees.

The employer paid straight time instead of time-and-a-half for hours over 40 in a workweek. The Dept. of Labor said San Lorenzo owed:

- \$250,605.50 in back wages, and
- \$250,605.50 in liquidated damages.

More info: www.dol.gov/newsroom/releases/whd/whd20230803-3

■ 70 HOURS PER WEEK WITHOUT OVERTIME PAY

Advantix Logistics Corp., a Lyndhurst, NJ, staffing agency, paid warehouse employees a combination of hourly and piece rates – but no overtime premium. They sometimes worked 70 hours per week.

The employer also failed to keep accurate records of hours worked.

For its Fair Labor Standards Act violations, Advantix Logistics had to pay 289 employees a total of:

- \$455,000 in back wages, and
- \$455,000 in liquidated damages.

More info: www.dol.gov/newsroom/releases/whd/whd20230508



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Why Payroll should be ready to pay workers according to terms of CBA

■ EMPLOYEE-FRIENDLY RULING FROM NATIONAL LABOR RELATIONS BOARD

Paying unionized employees according to the terms of a collective bargaining agreement (CBA) – when it comes to wages, overtime, bonuses and a variety of other topics – requires careful attention to detail.

Now more than ever, Payroll pros should be prepared to understand and handle CBAs.

The reason? A new ruling from the National Labor Relations Board (NLRB) just made it easier for employees to unionize.

According to the NLRB’s decision in *Cemex Construction Materials Pacific, LLC*, when a union requests recognition based on the fact that a majority of employees in an appropriate bargaining unit have designated the union as their representative, an employer has two choices.

The choices are:

- recognizing and bargaining with the union, or
- filing a petition with the NLRB to get an election.

The ruling puts additional pressure on employers – the petition can be

dismissed without the opportunity for an election if the employer commits unfair labor practices.

In fact, the NLRB will order the employer to recognize and bargain with the union.

In the *Cemex* case, the employer engaged in more than 20 instances of objectionable or unlawful misconduct during the period between when the election petition was filed and when the election was held.

Therefore, the building materials company must bargain with the union, the NLRB ruled on Aug. 25, 2023.

Past union rulings

Here’s a look at where we’ve been:

A 1949 case, *Joy Silk*, required employers to bargain with a union unless they had a good-faith doubt of the union’s majority status.

Things shifted in 1969 with *NLRB v. Gissel Packing Co.* In that case, the employer said the authorization cards the union had obtained from a majority of employees were “inherently unreliable.” But the employer had committed unfair labor practices, making a fair election unlikely, so it had to bargain.

More info: bit.ly/unions677

WHD and EEOC working together to enforce laws

Now that two federal agencies have agreed to coordinate their efforts, the need to stay in compliance with federal laws is more pressing.

The Dept. of Labor’s Wage and Hour Division (WHD) and the Equal Employment Opportunity Commission (EEOC) signed a memorandum of understanding (MOU) on Sept. 13, 2023.

Here’s the plan

The MOU’s purpose is to enhance and maximize the enforcement of federal laws – e.g., the Fair Labor

Standards Act and the Pregnant Workers Fairness Act. The agencies say they’ll:

- **Share information.** This may include complaint referrals and other info related to alleged violations of the laws.
- **Coordinate investigations and enforcement.** For example, the WHD may provide employees with informational materials prepared by the EEOC and vice versa.
- **Team up for training and outreach.** For one thing, you may see joint policy statements from the agencies.

More info: tinyurl.com/mou677

NEWS YOU CAN USE

■ IRS ANNOUNCES HIGHER INTEREST RATES FOR Q4

Interest rates will be higher for the fourth quarter of 2023, the IRS said in Revenue Ruling 2023-17.

The new rates are:

- 8% for overpayments and 7% for corporations (up from 7% and 6%, respectively)
- 5.5% for the portion of an overpayment exceeding \$10,000 (up from 4.5%)
- 8% for underpayments (up from 7%), and
- 10% for large corporate underpayments (up from 9%).

More info: www.irs.gov/pub/irs-drop/rr-23-17.pdf

■ TIME FRAME FOR E-FILING 941-X? IRS GIVES UPDATE

The IRS is still working to make the electronic filing of amended employment tax returns an option. That will include Form 941-X.

More than likely, this electronic filing capability will be available after the 2024 filing season, the IRS shared during its September Payroll Industry Call.

More info: www.irs.gov/newsroom/irs-launches-paperless-processing-initiative

■ MEAL AND REST BREAK PROVISIONS GET ‘RE-ROUTED’

In 2018 and 2020, the Federal Motor Carrier Safety Administration (FMCSA) issued decisions preempting the meal and rest break provisions in California and Washington. Note: These states’ laws for certain motor carriers vehicles are stricter than the federal ones.

In a recent notice posted in the *Federal Register*, the FMCSA said it’ll now consider petitions for waivers from the earlier decisions.

The petitions are due by Nov. 13, 2023.

More info: *Federal Register*, 8/14/23.

Are annual pay raises keeping up with inflation? No, survey shows

■ HERE'S WHAT EMPLOYEES SAID THIS YEAR IN 'GETTING PAID IN AMERICA'

The 2023 edition of the *Getting Paid in America* survey has been released. It reveals that although most employers give out annual pay raises, the increase isn't enough to keep up with inflation.

This year's survey, presented by PayrollOrg (formerly the American Payroll Association), asked respondents if their employer offered an annual raise. Overwhelmingly, the answer was yes (68.70%). Meanwhile, 20.64% said no. A handful of participants, 10.66%, didn't know.

As for whether that raise would keep pace with the rising rate of inflation, 78.72% of those surveyed answered no, with 21.28% answering in the affirmative.

Employees prefer higher wages to better health benefits. That sentiment is growing – 73% chose the wages as opposed to the benefits in 2023, up from 65.10% last year.

The percent of employees being paid by direct deposit has continued

to rise. In 2023, the number is 95.15%, compared with 93.26% last year.

Paper paychecks remains in the runner-up position, with 2.85% currently being paid that way, down from 3.62% in 2022. No other options broke the 1% barrier this year or last, whether a payroll card; an online payment system like PayPal or Venmo; or a prepaid reloadable card.

No matter what the method, Payroll continues to deliver on-time pay to employees. In fact, 91.01% of those surveyed attested to the timely paychecks. That's up from 90.69% last year.

Withholding correctly

Employees have confidence that their payroll withholding and the net amount of their paychecks are correct each payday.

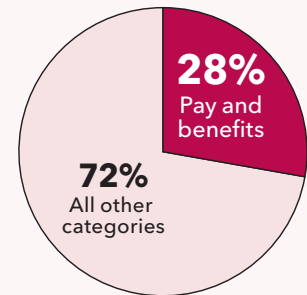
More than half (52.65%) are *very certain* about that, and 32.78% are *somewhat certain*. Only 7.82% are *not very certain*, while 4.02% are *not certain at all*. The remaining 2.73% said they don't know.

More employees than not (47.72%

WHAT PAYROLL PROS TOLD US

Workplace changes

If you could make one change at your current employer to make it a great place to work, what would it be?



Source: Gallup's State of the Global Workplace 2023 Report

When asked what they'd change about their current workplace, more employees responded with "pay and benefits" than any of the other suggested categories.

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

vs. 43.02%) had completed a new Form W-4 before this tax year began. However, 9.26% didn't know if they filled out a new withholding form.

If employees have questions, most of them – 87.31% – can access their pay and benefits information online.

More info: PayrollOrg, www.payroll.org

REAL-LIFE SCENARIO: DID THEY GET IT RIGHT?

Employee sued, saying she should have been paid for 2 Friday holidays in 2020

A children's hospital with a location in Oregon faced this real-life scenario:

After posting a job for a departmental assistant, the hospital sent an offer letter to one candidate. The offer letter explained she'd be an at-will employee. What's more, she'd be a 1.0 full-time equivalent (FTE) employee. Of note, the job posting and the hospital's new hire checklist referred to the position as 0.8 FTE.

During her employment, the departmental assistant corresponded with her supervisor via email about her employment status. On one occasion, her supervisor encouraged her to keep her hours to 64 per

biweekly pay period. Another email explained she was scheduled to work Monday through Thursday each week.

In yet another email, her supervisor highlighted policy information from the handbook about holidays – i.e., if a holiday fell on an employee's regularly scheduled workday, then time off would be paid with that person's available paid time off (PTO).

The supervisor and HR repeatedly told the departmental assistant that she was a 0.8, not a 1.0, FTE employee. According to them, the offer letter had contained a clerical error. Nonetheless, the employee sued the hospital, bringing several claims.

One claim was for unpaid wages for two holidays in 2020: the day after Thanksgiving and Christmas, both of which occurred on Fridays.

The federal district court sided with the employer because under Oregon law, if the terms of employment change and an employee keeps working, that implies consent.

Checklist for compliance

- Reconcile offer letters, new hire checklists and your company handbook to catch discrepancies.
- Be sure your PTO policies are clearly explained in your handbook.

Tracking local laws and regs

■ Hazard pay kicked in here after Hurricane Lee made landfall

On Sept. 14, 2023, the Maine governor declared a state of emergency due to Hurricane Lee, triggering a hazard pay provision for employers in Portland, ME.

Due to a 2020 referendum, when there's a state of emergency, Portland employers must pay one-and-a-half times the city's minimum wage rate. As the 2023 minimum wage is set at \$14 per hour, the hazard pay rate is \$21 per hour.

The increased rate was short-lived as the state of emergency was lifted on Sept. 17, 2023.

More info: tinyurl.com/portland677

■ IRS grants tax relief to 2 counties following Hawaii wildfires

In Hawaii, two counties have been given extra time to file returns and pay taxes.

Following wildfires that began on Aug. 8, 2023, employers in the

counties of Maui and Hawaii now have until Feb. 15, 2024, the IRS said.

Penalties on payroll and excise tax deposits due on or after Aug. 8, 2023, will be abated if the deposits were made by Sept. 7, 2023.

More info: tinyurl.com/hawaii677

■ 5 Indiana counties have set new income tax rates

Effective Oct. 1, 2023, the following five counties have changed their income tax rates:

- Adams – decreased from 0.01624 to 0.016
- Clinton – increased from 0.0245 to 0.0265
- Dearborn – increased from 0.012 to 0.014
- Henry – increased from 0.017 to 0.018, and
- Vanderburgh – increased from 0.012 to 0.0125.

More info: www.in.gov/dor/files/dn01.pdf

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:

Is new instant payment system available at all banks?

Q: If we want to use the new instant payment system created by the Federal Reserve, will that necessarily be available at our bank?

A: Banks and credit unions can choose whether to offer the new system, so there's no guarantee it'll be available at your financial institution yet. But a bank or credit union of any size can use the system. The FedNow Service went live July 20, 2023. With

this, you can instantly transfer money, any time of the day, any day of the year. For example, a company may utilize this to make an employee's paycheck instantly available. That person would then have access to the funds immediately. Or say one of your business's clients pays an invoice using FedNow – your company would be able to instantly access those funds. Note: Other Federal Reserve payment services such as Fedwire and FedACH are still available.

More info: www.federalreserve.gov/newsevents/pressreleases/other20230720a.htm

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 forms, instructions and other publications contains Payroll-related updates.

- Publication 5859, *Exempt Organizations Technical Guide TG 3-1: Overview, Applications, Exemption Requirements – Section IRC 501(c)(3)*. Revision date: September 2023. Posted date: 9/7/23.
- Form 14234-A, *Compliance Assurance Process Research Credit Questionnaire*. Revision date: August 2023. Posted date: 9/11/23.
- Publication 1915, *Understanding Your IRS Individual Taxpayer Identification Number*. Revision date: June 2023. Posted date: 9/11/23.
- Form 4972, *Tax on Lump-Sum Distributions*. Revision date: 2023. Posted date: 9/14/23.
- Publication 1220, *Specifications for Electronic Filing of Forms 1097, 1098, 1099, 3921, 3922, 5498 and W-2G*. Revision date: September 2023. Posted date: 9/18/23.
- Publication 5855, *Inflation Reduction Act, Prevailing Wage & Registered Apprenticeship Overview*. Revision date: August 2023. Posted date: 9/18/23.
- Publication 5084, *Congressional Update*. Revision date: September 2023. Posted date: 9/20/23.

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

- **MINIMUM WAGE:** Employers will need to pay at least \$16 per hour starting Jan. 1, 2024. The minimum wage will increase from the current \$15.50 per hour for all employers. **More info:** tinyurl.com/california677
- **PAID SICK LEAVE:** If the governor signs SB 616 as expected, the state's paid sick leave requirements will change on Jan. 1, 2024. Employers would then need to provide 40 hours or five days per year, up from 24 hours or three days. What's more, the accrual cap would increase from 48 hours per year to 80 hours. **More info:** tinyurl.com/paidsickleave677

GEORGIA

- **INTERNAL REVENUE CODE:** Due to SB 56, for tax years beginning on or after Jan. 1, 2022, when state law mentions the Internal Revenue Code (IRC), that's referring to the IRC of 1986, as amended, provided for in federal law enacted on or before Jan. 1, 2023. **More info:** tinyurl.com/georgia677

MONTANA

- **INCOME TAX:** Under HB 447, which takes effect Jan. 1, 2024, employers don't have to withhold income tax from a nonresident employee's compensation if that person works in the state for not more than 30 days during a tax year. Certain employees are excluded from the 30-day provision, such as key employees – i.e., those whose income exceeds \$500,000 in the previous tax year. Other excluded employees

are professional athletes or members of a professional athletic team; professional entertainers who performs services in the professional performing arts; and individuals who perform construction services to improve real property, predominantly on construction sites as laborers.

More info: leg.mt.gov/bills/2023/billpdf/HB0447.pdf

- **TAX REPORTING:** To file certain forms, including Forms W-2, electronically, employers will need to use the Dept. of Revenue's TransAction Portal (TAP). The automated tax reporting links in the ePass system have been shut down. Employers will need to set up a TAP account through the new system. Note: Unclaimed property reports will also be filed through TAP now; however, no login is required for this. **More info:** tinyurl.com/montana677

NEW YORK

- **PAYING EMPLOYEES:** Due to SB S2832A, wage theft is now considered criminal larceny. For one thing, the bill amends the penal law so that *wages* is included in the definition of *property*. The bill goes on to state that a person obtains property by wage theft when he or she hires someone to perform services which are performed but that person isn't paid the minimum wage rate and overtime as promised. Furthermore, if the nonpayments or underpayments occurred in multiple counties and they're made to and from the same people who made and received the amounts, then all nonpayments and underpayments can be aggregated. **More info:** www.nysenate.gov/legislation/bills/2023/S2832/amendment/A

NORTH CAROLINA

- **UNEMPLOYMENT INSURANCE:** Get ready for a new way to handle unemployment insurance

reporting. The North Carolina State Unemployment Insurance Tax System (NCSUITS) is a new, modernized system which the North Carolina Dept. of Commerce (DES) plans to launch in the fall of 2023. It's a cloud-based solution that replaces a decades-old system. NCSUITS is easier to use with more self-service options. Some features of NCSUITS include being able to report out-of-state wages; provide multiple contacts and contact types to communicate with DES; and request a penalty waiver. **More info:** www.des.nc.gov/ncsuits

OREGON

- **INTERNAL REVENUE CODE:** Due to SB 141, references in state law to the Internal Revenue Code (IRC) mean the IRC as amended and in effect on Dec. 31, 2022. **More info:** olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB141

THE LIGHTER SIDE

At the Colonial School District in Montgomery County, PA, students recently started their first day of "Twin-dergarten."

The district assigned its newest Kindergarten class that nickname given that it contains the highest number of twins in its recent history - 17 sets.

All 34 of these students *aren't* in one classroom, though. Ridge Park Elementary School has seven pairs of twins joining its Kindergarten class, Whitmarsh Elementary School has six and Plymouth Elementary has four.

At the start of any school year, the challenge of keeping students' names straight is tough enough for teachers, let alone when they're teaching "twin-dergarteners." So, maybe they deserve to be paid a "twin differential."

Cite: tinyurl.com/twins677