

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™

February 1, 2024

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

- **Feb. 2, 2024:** Deposit taxes for payroll on Jan. 27, 28, 29, 30.
- **Feb. 7, 2024:** Deposit taxes for payroll on Jan. 31; Feb. 1, 2.
- **Feb. 9, 2024:** Deposit taxes for payroll on Feb. 3, 4, 5, 6.
- **Feb. 14, 2024:** Deposit taxes for payroll on Feb. 7, 8, 9.
- **Feb. 16, 2024:** Deposit taxes for payroll on Feb. 10, 11, 12, 13.
- **Feb. 22, 2024:** Deposit taxes for payroll on Feb. 14, 15, 16.
- **Feb. 23, 2024:** Deposit taxes for payroll on Feb. 17, 18, 19, 20.
- **Feb. 28, 2024:** Deposit taxes for payroll on Feb. 21, 22, 23.

MONTHLY DEPOSITORS

- **Feb. 15, 2024:** Deposit taxes for payments made during January 2024.
- **March 15, 2024:** Deposit taxes for payments made during February 2024.

ALL EMPLOYERS

- **April 30, 2024:** File Q1 Form 941. Note: If you properly deposited taxes on time and in full, you have until May 10, 2024, to file.

New independent contractor rule includes 6-factor test

■ *Minimum wage, OT pay depend on correct status*

The Dept. of Labor (DOL) has finalized a rule that'll make it more difficult for employers to classify workers as independent contractors under the Fair Labor Standards Act (FLSA).

The final rule will take effect March 11, 2024. With just two months to prepare, employers will need to follow a six-factor test to determine an independent contractor's status. Companies that get it wrong risk violating the minimum wage and overtime provisions of the FLSA.

Here are the details:

Who's an independent contractor?

The six-factor test is similar to the standard used prior to 2021:

Factor #1: Opportunity for profit or loss depending on managerial skill. Information such as whether the worker can meaningfully negotiate pay for the work provided will continue to be relevant.

Factor #2: Investments by the worker and the potential employer. When looking at how the investments of the worker compare to the potential employer's investments, it's not only dollar value or size that counts. Examine whether the worker is making similar types of investments, even if on a smaller scale.

Factor #3: Degree of permanence of the work relationship. If the work relationship is indefinite in duration

(Please see 6-factor test ... on Page 2)

Federal appeals court weighs in on payroll deductions

Unlike subscription fees for streaming apps, employees' payroll deductions for union fees couldn't be immediately stopped by arguing with a customer service rep, a judge for the Third Circuit observed in a recent opinion.

The employees had signed union membership applications, authorizing the deduction of union dues from their paychecks.

The voluntary authorization remained valid year after year, even if they dropped their union membership. However, the employees had an annual window ranging from 10 to 30 days during which they

could revoke the authorization by submitting a written notice.

Resigning from unions

After a group of employees quit their unions, they didn't want to wait for that window. So they sued.

In *Barlow v. Service Employees Int'l Union*, they said their First Amendment rights had been violated – the payroll deductions for union dues amounted to compelled speech.

The court disagreed. Reason? They'd voluntarily become union members, agreeing to the terms.

More info: tinyurl.com/union684

Employees banked overtime hours then got paid at straight-time rates

■ NEARLY \$50K OWED TO 61 WORKERS AT SOUTH CAROLINA DAYCARES

In Myrtle Beach, SC, two daycare facilities failed to comply with the Fair Labor Standards Act (FLSA) when they allowed employees to bank overtime hours.

That was a problem in and of itself.

To make matters worse, the employer then paid employees for the banked time at straight-time rates in later workweeks.

The Dept. of Labor (DOL) found two additional violations of the FLSA's overtime provisions at Kids Paradise Child Development Center LLC:

- First, nondiscretionary bonuses should have been – but weren't – included in employees' regular rates of pay when calculating the overtime premium.
- Second, two nonexempt employees who were paid on a salary basis

didn't receive time-and-a-half the regular rate of pay when their hours exceeded 40 in a workweek.

Finally, the DOL said that the daycare facilities didn't maintain accurate payroll records because the banked hours didn't show up in its recordkeeping.

For the FLSA violations at its two locations, Kids Paradise Child Development Center owed \$47,287 in back wages for 61 workers.

Tracking OT week by week

With few exceptions, employers can't allow employees to bank overtime hours, even if the employees say they'd prefer that.

The clock resets on hours worked each workweek.

More info: www.dol.gov/newsroom/releases/whd/whd20240110

6-factor test ...

(continued from Page 1)

or continuous, that weighs in favor of the worker being an employee rather than an independent contractor.

Factor #4: Nature and degree of control. Ensuring compliance with a law or reg might be necessary. But if you've classified someone as an independent contractor, be careful not to cross the line into insisting on your own compliance methods or standards.

Factor #5: Extent to which the work performed is an integral part of the potential employer's business. Someone doing work that's critical, necessary or central to the potential employer's principal business is likely an employee.

Factor #6: Worker's skill and initiative. Bringing a specialized skill to a job doesn't necessarily indicate if someone is an independent contractor or an employee. But if that skill is used in connection with a business-like initiative, you may be dealing with an independent contractor.

More info: *Federal Register*, 1/10/24.

COMPLIANCE CHECK

■ CONCRETE CONTRACTOR HAS A CRACK IN ITS COMPLIANCE

Lonsdale Construction Inc. – doing business as AJ Concrete Pumping in Cumberland, RI – failed to pay the proper overtime rate to 47 workers. Plus, the company didn't keep records of hours worked as required under the Fair Labor Standards Act. The residential concrete foundation and structure contractor had to pay:

- \$35,567 in civil money penalties
- \$54,044 in back wages, and
- \$54,044 in liquidated damages.

More info: www.dol.gov/newsroom/releases/whd/whd20240103

■ SECURITY GUARDS WEREN'T INDEPENDENT CONTRACTORS

In Michigan, the Muskegon Heights Housing Commission misclassified 32 security guards as independent contractors. That led to overtime and recordkeeping violations. The Dept. of Labor determined the employer owed:

- \$9,310 in civil money penalties
- \$49,158 in back wages, and
- \$49,158 in liquidated damages.

More info: www.dol.gov/newsroom/releases/whd/whd20231201

■ \$277K-PLUS OWED FOR H-2B WORKER MISSTEPS

Vee Pak LLC, doing business as Voyant Beauty, violated provisions of the H-2B worker program, which is part of the Immigration and Nationality Act. For example, the company fired 17 U.S. workers and replaced them with H-2B workers. It also failed to pay 33 H-2B workers for meal and lodging expenses. As a result, the company owed:

- \$277,315 to the workers, and
- \$20,003 in civil money penalties

More info: www.dol.gov/newsroom/releases/whd/whd20230829-1

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IRS is sending out 40,000 letters regarding problematic tax credit

■ SOME EMPLOYERS THAT CLAIMED ERC WEREN'T ELIGIBLE FOR IT

The IRS recently gave an update on its efforts to scale back the misuse of the employee retention credit (ERC).

Speaking during the January IRS Payroll Industry Call, a Service representative stated that the IRS has been reviewing ERC claims.

Some employers weren't eligible for the tax credit – in fact, a large block of taxpayers didn't meet basic criteria for it, according to a December IRS news release.

So, at the end of 2023, the IRS sent out more than 20,000 letters.

Thousands of entities nationwide received Letter 105 C, *Claim Disallowed*, because during the period of eligibility they:

- weren't in existence, or
- had no paid employees.

Now, the IRS is going to send out 20,000 more letters as the result of some "internal data mining," the representative explained during the call.

This second round of letters will be sent to taxpayers that erroneously

claimed the ERC and have already received it. The goal is to recapture the money.

Given the different focus this time around, the IRS is using a different letter – an entirely new one, in fact.

Taking action now

Employers that are questioning if their claim was legitimate don't have to wait to see if they receive a letter from the IRS.

Pertinent information can be found on the IRS website, the representative noted during the call.

On the IRS website, there are details on:

- withdrawing an ERC claim, and
- participating in the Voluntary Disclosure Program.

You can withdraw a claim if the ERC hasn't been paid yet or if you've received a check but haven't cashed or deposited it yet. Other conditions must be met.

The Voluntary Disclosure Program is the route to take if the ERC has been paid and you want to repay it. With this, you can subtract 20% from the amount owed.

More info: tinyurl.com/erc684

Need more time to get statements to employees?

The IRS has created a new form. It's Form 15396, *Application for Extension of Time to Furnish Recipient Statements*.

Employers that need more time – up to 30 days – to get certain statements into employees' hands can request a one-time extension.

Line 4 of Form 15396

On line 4, you can check the boxes that apply. There are 12 boxes that correlate to the following forms.

- 1042-S
- 1094-C, 1095-C

- 1097, 1098, 1099, 3921, 3922, W-2G
- 1099-NEC
- 1099-QA
- 1095-B
- 5498
- 5498-ESA
- 5498-QA
- 5498-SA
- 8596, and
- W-2.

Submit Form 15396 by the date statements are due to employees.

More info: tinyurl.com/extension684

NEWS YOU CAN USE

■ NEW BOX 12 CODE ON 2024 W-2: HERE'S WHAT IT MEANS

When filling out Forms W-2 for 2024, certain employers will need to utilize a new code for box 12.

The new code is 11 (as in, following HH on the list).

It's for Medicaid waiver payments excluded from gross income under Notice 2014-7. The code is pertinent to state agencies, for example, that make "difficulty of care payments" to individuals.

More info: www.irs.gov/pub/irs-pdf/fw2.pdf

■ NOTE THESE CHANGES TO 1099-MISC AND 1099-NEC

The IRS recently updated Form 1099-MISC and Form 1099-NEC to contain information about the lower electronic filing threshold.

In addition, on both forms:

- the calendar year is completely blank (as opposed to including "20" as the first two digits), and
- Copy C, previously the payer copy, has been removed.

More info: www.irs.gov/pub/irs-pdf/i1099mec.pdf

■ FRINGE BENEFIT INFO FOR GOVERNMENT EMPLOYERS

Government entities that have employees using employer-provided vehicles for personal use may be able to use the commuting valuation rule to determine the value of the fringe benefit.

However, that's not an option if the employee is a government control employee. For 2024, a government control employee is someone whose annual salary exceeds \$180,000 – i.e., the salary of a Level V executive.

The 2023 amount was \$172,100.

That's according to *Salary Table No. 2024-EX*, released by the Office of Personnel Management.

More info: bit.ly/control684

Minimum wage rates in effect as of Jan. 1, 2024: See what's changed

■ 22 STATES KICKED OFF THE NEW YEAR WITH INCREASES IN HOURLY RATES

Across the country, states have announced increases in their minimum wage rates.

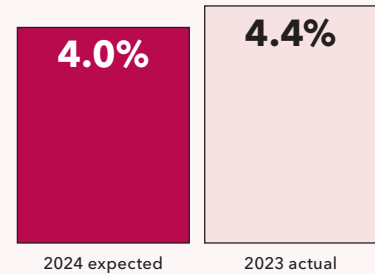
Here are the rates in effect as of Jan. 1, 2024, with last year's rates in parentheses. If a state uses tiered rates, the highest rate is noted. States that'll make mid-year changes are bolded:

Alabama – \$7.25 (\$7.25)	Kentucky – \$7.25 (\$7.25)
Alaska – \$11.73 (\$10.85)	Louisiana – \$7.25 (\$7.25)
Arizona – \$14.35 (\$13.85)	Maine – \$14.15 (\$13.80)
Arkansas – \$11 (\$11)	Maryland – \$15 (\$13.25)
California – \$16 (\$15.50)	Massachusetts – \$15 (\$15)
Colorado – \$14.42 (\$13.65)	Michigan – \$10.33 (\$10.10)
Connecticut – \$15.69 (\$15)	Minnesota – \$10.85 (\$10.59)
Delaware – \$13.25 (\$11.75)	Mississippi – \$7.25 (\$7.25)
Florida – \$12 (\$11)	Missouri – \$12.30 (\$12)
Georgia – \$7.25 (\$7.25)	Montana – \$10.30 (\$9.95)
Hawaii – \$14 (\$12)	Nebraska – \$12 (\$10.50)
Idaho – \$7.25 (\$7.25)	Nevada – \$11.25 (\$10.50)
Illinois – \$14 (\$13)	New Hampshire – \$7.25 (\$7.25)
Indiana – \$7.25 (\$7.25)	New Jersey – \$15.13 (\$14.13)
Iowa – \$7.25 (\$7.25)	New Mexico – \$12 (\$12)
Kansas – \$7.25 (\$7.25)	New York – \$15 (\$14.20)
	North Carolina – \$7.25 (\$7.25)
	North Dakota – \$7.25 (\$7.25)
	Ohio – \$10.45 (\$10.10)
	Oklahoma – \$7.25 (\$7.25)
	Oregon – \$14.20 (\$13.50)
	Pennsylvania – \$7.25 (\$7.25)
	Rhode Island – \$14 (\$13)
	South Carolina – \$7.25 (\$7.25)
	South Dakota – \$11.20 (\$10.80)
	Tennessee – \$7.25 (\$7.25)

WHAT PAYROLL PROS TOLD US

Salary increases

By how much is your company planning to increase salaries?



Source: Salary Budget Planning Survey by WTW, December 2023 survey

When it comes to salaries, the companies surveyed anticipated increases of 4.0% in 2024. That's down slightly from their actual increases of 4.4% in 2023.

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

Texas – \$7.25 (\$7.25)
Utah – \$7.25 (\$7.25)
Vermont – \$13.67 (\$13.18)
Virginia – \$12 (\$12)
Washington – \$16.28 (\$15.74)
West Virginia – \$8.75 (\$8.75)
Wisconsin – \$7.25 (\$7.25)
Wyoming – \$7.25 (\$7.25)

REAL-LIFE SCENARIO: DID THEY GET IT RIGHT?

Employer tried to recoup money under training repayment agreement

A healthcare system in Florida faced this real-life scenario:

A nurse took a position in the emergency room of a community hospital. One of the agreements she signed when she came on board was the Specialty Fellowship Program employment agreement.

According to that agreement, the employer would provide 16 to 20 weeks of training and she would work in the emergency room for two years on a full-time basis. The training consisted of working under the supervision of another nurse and participating in classroom courses once per week. If she left prior to

reaching the two-year mark, she'd owe the employer a \$5,000 program fee.

During the first couple months, she sometimes worked without supervision from another nurse, and then her supervisor requested that she exit the program altogether.

With less than one year on the job, she quit. In response, the employer deducted money from her final paycheck to recoup some of the \$5,000 and then demanded she repay the balance due.

The employee sued under the Florida Deceptive and Unfair Trade Practices Act, saying the \$5,000 fee was inflated and its purpose was

to restrict her ability to quit. The employer argued her claims about the training were subjective. The court disagreed – after all, her training was cut short. The employer also argued her allegations didn't involve trade or commerce. Again, the court wasn't convinced. One reason was this ad: "Start your nursing career today."

Checklist for compliance

- Training repayment agreements have been under increasing scrutiny.
- Review the wording of job postings to ensure you don't cross any lines with federal or state laws.

Tracking local laws and regs

■ San Francisco employers should be using these HCE hourly rates

San Francisco has announced its 2024 Health Care Expenditure (HCE) hourly rates. They are:

- \$3.51 (up from \$3.40) for all large employers, and
- \$2.34 (up from \$2.27) for medium employers – businesses with 20-99 workers and nonprofits with 50-99 workers.

Small businesses are exempt under the city's Health Care Security Ordinance.

More info: www.sf.gov/information/health-care-security-ordinance

■ Colorado county now has local minimum wage requirements

Employers in unincorporated Boulder County, CO, are now subject to a minimum wage ordinance.

The hourly rate, as of Jan. 1, 2024, was \$15.69.

More info: bouldercounty.gov/government/ordinances

■ On Jan. 1, 2024, income tax rates increased in 13 Indiana counties

These Indiana counties have raised their income tax rates effective Jan. 1, 2024:

- Allen – 0.0159 (was 0.0148)
- Blackford – 0.025 (was 0.015)
- Crawford – 0.0165 (was 0.01)
- Floyd – 0.0139 (was 0.0135)
- Franklin – 0.017 (was 0.015)
- Howard – 0.0195 (was 0.0175)
- Jefferson – 0.0103 (was 0.009)
- Ohio – 0.02 (was 0.015)
- Pike – 0.012 (was 0.0075)
- Posey – 0.0145 (was 0.0125)
- Putnam – 0.023 (was 0.021)
- Ripley – 0.0238 (was 0.0138), and
- Steuben – 0.0199 (was 0.0179)

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:

What should we do if Form I-9 is lost, damaged or destroyed?

Q: When a natural disaster hit our area, we had a near miss with some of our new hire paperwork. What should we do in the future if any of our Forms I-9 are lost, damaged or destroyed?

A: According to U.S. Citizenship and Immigration Services (USCIS), in the event that a current employee's original I-9 is damaged or destroyed by unforeseen circumstances, you should complete a new Form

I-9 for that person. You should explain in writing why you created a replacement form. For example, you might say: "Original Form I-9 destroyed in [name and year of natural disaster or emergency]." You can either use the Additional Information field on Form I-9 or attach a signed and dated written explanation to the form. As for employers that use E-Verify, you're not supposed to create a new E-Verify case in the event that an original Form I-9 was lost, damaged or destroyed, USCIS explains on its website.

More info: bit.ly/disaster684

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 and publications contains Payroll-related updates.

- Form 943, *Employer's Annual Federal Tax Return for Agricultural Employees*. Revision year: 2023. Posted date: 11/22/23.
- *Instructions for Form 943*. Revision year: 2023. Posted date: 11/22/23.
- Form 8952, *Application for Voluntary Classification Settlement Program*. Revision date: November 2023. Posted date: 11/28/23.
- Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*. Revision year: 2023. Posted date: 12/4/23.
- Form 940, *Employer's Annual Federal Unemployment Tax Return*. Revision year: 2023. Posted date: 12/5/23.
- *Instructions for Form 940*. Revision year: 2023. Posted date: 12/5/23.
- Form 8962, *Premium Tax Credit*. Revision year: 2023. Posted date: 12/6/23.
- Form 8959, *Additional Medicare Tax*. Revision year: 2023. Posted date: 12/6/23.
- *Instructions for Form 8959*. Revision year: 2023. Posted date: 12/6/23.
- Form 8941, *Credit for Small Employer Health Insurance Premiums*. Revision year: 2023. Posted date: 12/11/23.

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!

3.15% in 2023. **More info:** www.in.gov/dor/business-tax/tax-rates-fees-and-penalties

Employer's Tax Guide. **More info:** dor.mo.gov/forms/4282_2024.pdf

CALIFORNIA

- **PAID SICK LEAVE:** Given that the paid sick leave law has been expanded effective Jan. 1, 2024, the state has revised the *Notice to Employee* form. The second page of the form now says that each year, employees may use up to five days or 40 hours of accrued paid sick leave – whichever is greater. Note: Employers can choose whether to have an accrual policy or to provide the paid sick leave to employees upfront at the beginning of each year. **More info:** www.dir.ca.gov/dlsellc_2810.5_notice.pdf

CONNECTICUT

- **SEVERANCE PAY:** The state's efforts to achieve solvency with its unemployment insurance (UI) trust fund have resulted in some changes that went into effect Jan. 1, 2024. One change is that a claimant who receives severance pay will be disqualified from receiving UI benefits for the period of time covered by the severance pay. Another change involves vacation pay. With this, if a claimant receives accrued vacation pay at the time of dismissal, that doesn't disqualify the individual from receiving UI benefits. However, if the vacation pay is issued during a shutdown period, the person will either be disqualified from receiving UI benefits or the benefits will be reduced. **More info:** tinyurl.com/severance684

INDIANA

- **WITHHOLDING:** The state has decreased its individual adjusted gross income tax rate for 2024. The rate is 3.05%, down from

IOWA

- **WITHHOLDING:** In response to SF 565, legislation from 2023, the withholding formula and the IA W-4, *Employee Withholding Allowance Certificate*, have been revised. The Iowa Dept. of Revenue says employers should encourage employees to file a 2024 version of the state W-4. For employees who don't do that, employers should use \$40 as the total allowance amount and \$0 as the additional withholding amount when calculating their withholding amounts. **More info:** tax.iowa.gov/idr-issues-new-income-withholding-tax-tables-2024

MINNESOTA

- **PAYSTUBS:** Earnings statements – i.e., paystubs – must include certain information regarding earned sick and safe time (ESST), according to a FAQ list from the Dept. of Labor and Industry. First, paystubs must include the total number of sick and safe time hours accrued and available for use. Second, they must include the total number of sick and safe time hours used in the pay period. In an answer added Dec. 4, 2023, the state clarified that employers can't simply tell employees how to find info about their ESST in their timekeeping system. Although it's okay to make that info available in a company portal or in timekeeping software, it must also be placed on employees' earnings statements. **More info:** www.dli.mn.gov/sick-leave

MISSOURI

- **WITHHOLDING:** For 2024, the tax percentage rate for withholding from supplemental pay has decreased from 4.95% to 4.8%. That's according to the

NEW MEXICO

- **WITHHOLDING:** FYI 104, effective Jan. 1, 2024, contains updated withholding tables. If you pay workers supplemental wages or fringe benefits, use the same withholding method as on the federal level. For employers that use a flat rate, the state rate remains 5.9% for 2024. **More info:** www.tax.newmexico.gov/all-nm-taxes/current-historic-tax-rates-overview

OHIO

- **WITHHOLDING:** The Dept. of Taxation has updated its list of school districts with an income tax, effective Jan. 1, 2024. Reminder: Identify the school district by its four-digit code on Forms W-2. **More info:** tax.ohio.gov

THE LIGHTER SIDE

Wayne State's Word Warriors program aims to bring back words that have dropped out of use. Here are a few that appeared on the most recent annual list:

- Blatherskite – A person who talks at great length without making much sense.
- Kaffeeklatsch – An informal social gathering at which coffee is served.
- Pawky – Having a mocking or cynical sense of humor.
- Petrichor – A pleasant smell that frequently accompanies the first rain after a long period of warm, dry weather.

Challenge: See if you can weave some of those words into your conversations with co-workers.

Cite: today.wayne.edu/news/2024/01/08/wayne-state-word-warriors-release-2024-list-61301