



# Payroll Insights

Employment tax news to guide you now and for the future

November 2022



## John Montgomery's fresh take: 2022 Payroll Year-End Report and Checklist

Prepared jointly by KPMG Employment Tax and Bloomberg Tax & Accounting professionals, the 2022 Year-End Report covers a wide array of topics, including sections discussing policy issues, changes reflecting the requirements of the recent U.S. tax code overhaul, and common concerns at year-end that have been identified as historically troubling for employers. The checklist includes useful do's and don'ts that can help employers track year-end payroll responsibilities. [Click here to access the checklist.](#) (The report will be available towards the end of November.)



### Federal updates

#### Preparing for a change in worker classification

The U.S. Department of Labor has proposed a modification to the Wage and Hour Division that would impact the methodology used by employers to determine if individuals should be considered employees or independent contractors. While the proposed changes are still under review, the result would require employers to review all factors of the worker relationship. When determining a worker's classification status (i.e. employee or independent contractor) for federal employment tax purposes, there is currently a greater reliance on reviewing (1) the opportunity for the worker to earn a profit or loss in their business, and (2) the amount of control the hiring entity exhibits over the individual's work. The proposed changes would have similarities to the California ABC test that considers three conditions for determining worker classification.

Individuals classified as employees generally receive benefits such as minimum wage requirements, overtime, health plans, and workers' compensation, that are normally not available to those classified as independent contractors. In addition to employee benefits, employers are liable for the employer share of social security and Medicare taxes as well as federal and state unemployment contributions on wages paid to employees. The reclassification of an independent contractor to an employee status could be financially burdensome on certain employers and industries. Among other items, an increase in an employer's employee population following a worker reclassification could result in increased payroll and benefit costs.

The proposed changes would require employers to meticulously review current worker classifications as certain relationships may fall under the employer-employee status. This could have major impacts on the gig industry as companies may need to adapt if the proposed changes are ratified. It is paramount that employers continue to review their current independent contractor population and contracts in conjunction with any worker classification rule changes. Misclassifying workers as independent contractors rather than as employees could result in an employer being held liable for under withheld taxes, penalties and interest.



## Social Security wage base

On October 13, 2022, the Social Security Administration announced that the [2023 social security taxable wage base](#) will be \$160,200.

## Hurricane Ian – IRC Section 139 Disaster Relief Payments

Florida remains a designated disaster area following the aftermath of, and destruction caused by Hurricane Ian. Employers endeavoring to assist employees impacted by the hurricane can consider doing so through disaster relief payments made pursuant to [IRC Section 139](#). Generally, these payments should not be included in an employee's taxable income if such payments meet the definition of a qualified disaster relief payment. Qualified disaster relief payments generally include any amount paid to or for the benefit of an individual to reimburse or pay reasonable and necessary personal, family, living or funeral expenses incurred because of a disaster and not reimbursed by insurance. Employers should consult the designated disaster relief areas provided by FEMA as well as consider the details surrounding each payment to determine if the payment qualifies for IRC Section 139 exclusion.

\*As a footnote to the Section 139 Disaster Relief Payments, in previous years after a natural disaster a bill is signed that includes an employee retention credit (ERC) for employers who operated in a qualified disaster zone. For example, one was included in The Further Consolidated Appropriations Act after Hurricane Florence in Texas\*

## Navigating federal employment tax refunds

In a recent ruling (*Wyandot, Inc., v. United States*, Case No. 3:21-cv-1379), the United States District Court for the Northern District of Ohio, Western Division dismissed a case in which Wyandot, Inc., the taxpayer, sought to claim a refund for overpaid federal unemployment taxes between 2013 and 2017. While the overpayments were originally recognized by the IRS, a portion of the overpayments was applied to outstanding liabilities on the taxpayer's Form 941, *Employer's Quarterly Federal Tax Return*, for various quarters and years, with the remaining portion refunded to the taxpayer.

Generally, an overpayment of employment taxes does not necessarily create a debt to the taxpayer because there is no right to receive an overpayment until after the IRS has exercised its discretionary powers under IRC Section 6402(a) and Treasury Regulation Section 301.6402-1.

However, the taxpayer argued that it did not have a tax liability in the Form 941 periods in which the overpayments were applied. The taxpayer sought a full refund of the Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, accounts by writing a letter to the IRS but did not file the Forms 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*, for the periods in which the overpayments were applied to claim the refunds. The court determined that any refunds would need to be issued from the Form 941 accounts as that is where the Form 940 overpayments were applied.

This case demonstrates the importance of employers tracking all employment tax overpayments that may be applied to other accounts under the same Federal Employer Identification Number (FEIN) if an outstanding liability exist. It also demonstrates the importance of employers using the appropriate forms prescribed by the IRS for claiming refunds from the specific account in which the refunds are available.

## Form 941 and 941-X processing status

The IRS continues to feel the lingering impacts of COVID-19 as [Forms 941 and 941-X](#) continue to be subject to processing delays. As of October 12, 2022, the IRS had 3.4 million unprocessed Forms 941 and 219,000 unprocessed Forms 941-X. The forms are being processed in the order received and employers are encouraged to not file second tax returns while the original forms are still being processed.

Employers should continue to review IRS account transcripts to determine the status of Forms 941 and 941-X previously filed.



### 2023 state minimum wage

#### California

These cities have provided that employees performing at least two hours of work per week within their jurisdiction will be eligible for minimum wages of at least the following amounts in 2023:

- [Belmont](#): \$16.75 per hour
- [Cupertino](#): \$17.20 per hour
- [El Cerrito](#): \$17.35 per hour
- [Palo Alto](#): \$17.25 per hour
- [San Diego](#): \$16.30 per hour
- [San Mateo](#): \$16.75 per hour
- [Sunnyvale](#): \$17.95 per hour

#### Montana

- Employees that perform services in [Montana](#) will be eligible for minimum wages of at least \$9.95 per hour in 2023.

#### New Jersey

- Employees that perform services in [New Jersey](#) for an employer that employs at least six employees will be eligible for minimum wages of at least \$14.13 per hour in 2023. Employees that perform services in New Jersey for an employer that employs less than six employees will be eligible for minimum wages of at least \$12.93 per hour in 2023.

#### New York

- Employees that perform services within [New York](#) state but outside of New York City, Long Island and Westchester County will be eligible for minimum wages of at least \$14.20 per hour in 2023.

#### Ohio

- Employees that perform services in [Ohio](#) for a business with annual gross receipts of \$371,000 or more will be eligible for minimum wages of at least \$10.10 per hour in 2023. The minimum wage applicable to employees that perform services for a business with annual gross receipts of less than \$371,000 conforms to the federal minimum wage of \$7.25 per hour.

#### Seattle, Washington

- Employees that perform services in [Seattle, Washington](#) are eligible for the following minimum wages:
  - Performing services for a Large Employer (501 or more employees): \$18.69 per hour in 2023.
  - Performing services for a Small Employer (500 or fewer employees) that does not pay at least \$2.19 per hour toward the employee's medical benefits and/or if? the employee does not earn at least \$2.19 per hour in tips: \$18.69 per hour in 2023.
  - Performing services for a Small Employer (500 or fewer employees) that pays at least \$2.19 per hour toward the employee's medical benefits and/or if? the employee earns at least \$2.19 per hour in tips: \$16.50 per hour in 2023.

#### Other updates

- **California Employees Remain Eligible for COVID-19 Paid Leave**
  - [California Assembly Bill 152](#), signed by Governor Gavin Newsom, extends previously established COVID-19 paid sick leave benefits through December 31, 2022. California employers are required to provide up to 40 hours of paid sick leave to covered employees who are unable to work due to COVID-19.

- **Paid Family and Medical Leave**

- As the social security taxable wage base rises in 2023 it is important for employers to review and update any other taxable wage bases that conform to the social security taxable wage base, such as some state paid family and medical leave programs. Currently Colorado (first contributions to begin in 2023), Connecticut, Massachusetts, and Washington paid family and medical leave contributions are made on wages up to the social security taxable wage base.

- **Delaware Wage Payments to Terminated Employees**

- Signed by Governor John Carney on October 7, 2022, [Delaware Senate Substitute No. 1 for Senate Bill No. 208](#) amends the timing in which an employer is required to pay final wages to terminated employees. Terminated employee wages are now required to be paid either with the next regularly scheduled payroll or three days following the employee's termination, whichever occurs later.
- Many states required that employer's pay final wages to terminated employees on the day following termination, which can require manual payroll off-cycles to be compliant with state and local wage laws. Allowing final wage payments to be made with the next regularly scheduled payroll can provide administrative relief to employers and payroll professionals.



## Meet one of our Employment Tax Professionals: Dylan McLaughlin

Dylan is a Manager in KPMG's Short Hills, New Jersey office with over 6 years of employment tax experience and is a Certified Payroll Professional (CPP). Dylan specializes in assisting clients with the complexities of payroll compliance at the federal, state and local level.

Dylan enjoys spending time with his wife and their dog Archie, traveling to new places, and hosting friends and family as often as possible.

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