# Payroll Insights

Employment tax news to guide you now and for the future

February 2024

## John's *fresh take*: Clean-up in the payroll aisle

Congratulations on successfully completing the year-end filing season! Now that it's behind us, it's a good opportunity to consider any necessary clean-up. This is the perfect time to review the accuracy and timeliness of all payroll information reported for the 2023 calendar year. If any errors were made, now is the ideal moment to collaborate with your third-party payroll providers to rectify them or file any required amendments.

## Federal updates

### Navigating the ERC: IRS offers settlement program for incorrect claims

The IRS is set to release a settlement program for the Employee Retention Credit (ERC), a pandemic-era tax credit designed to help businesses retain employees during the Covid-19 shutdowns. According to the IRS, the ERC program has been exploited by companies filing fraudulent claims, prompting the agency to halt the processing of new ERC claims and introduce a program allowing taxpayers to withdraw incorrect claims.

In an effort to remedy the issue, the IRS is offering a voluntary disclosure program, expiring on March 22, 2024, for employers who received the ERC but didn't qualify for it. Employers who come forward will only have to repay 80% of the tax credit they received. In exchange, they must provide information on the advisers or tax preparers that assisted them.

The IRS has also started accepting requests to withdraw claims for employers who want to avoid future repayment, interest, and penalties. The agency has already received over $100 million in withdrawals since the relief option was offered.

In addition to this, the IRS is giving employers a second chance to correct erroneous pandemic-era tax credit claims, while also preparing to aggressively pursue third-party providers that may have claimed credits incorrectly. It has sent out over 40,000 letters rejecting claims that didn't meet the ERC's basic requirements or proposing tax adjustments to recover erroneously claimed credits.

The deadline for submitting amended returns for 2020 is April 15, 2024, and April 15, 2025, for 2021 returns. The IRS will continue to process claims made before the pause but at a much slower rate. If the agency doesn't take action within six months after a credit claim, employers can file a lawsuit.

The IRS also plans to issue an update on the suspension of processing new claims in the new year, providing further clarity on the future of the ERC program.

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### New U.S. Department of Labor rule challenges gig economy's independent contractor classification

The US Department of Labor has issued a final rule that makes it more challenging for companies to classify workers as independent contractors rather than employees. This rule affects various sectors, including the gig economy, construction, trucking, and healthcare, and changes how the Department determines a worker's status under the Fair Labor Standards Act (FLSA). Independent contractors, defined as workers who are not economically dependent on an employer and are in business for themselves, do not qualify for the same minimum wage or overtime pay protections as employees.

The rule employs an "economic realities" test to determine a worker's status, considering factors such as the worker's control over the work, opportunity for profit or loss, investment, permanency, and the nature of the work. This approach marks a return to a totality-of-the-circumstances analysis, where no factor has a predetermined weight, unlike a 2021 rule which designated two "core factors" that carried more weight. This 2021 rule was later rescinded due to its departure from case law and the FLSA's text and purpose.

The final rule aims to protect workers from being misclassified as independent contractors, ensuring they receive labor protections. It provides broader discussion on factors such as scheduling, remote supervision, price setting, and the ability to work for others, aiming to provide more consistent guidance to employers and workers on classification. Despite facing opposition from business and industry groups, including the US Chamber of Commerce, the Department believes that this rule, scheduled to take effect on March 11, recognizes the important role of independent contractors in the economy.

The rule's impact on gig companies. If applied stringently, factors such as control over work, opportunity for profit or loss, and investment could lead to a reclassification of many gig workers from independent contractors to employees. This would fundamentally alter the business models of these companies, potentially increasing their labor costs and affecting their flexibility. The rule does not provide specific guidance for any industry or job type, but its clarifications on how the "economic realities" factors are applied could have far-reaching implications for the gig economy.

### The IRS's 2023 performance: Highlights from the national taxpayer advocate annual report

The National Taxpayer Advocate Annual Report to Congress for 2023 provided a comprehensive evaluation of the IRS performance over the year. The report serves as a critical tool for keeping Congress informed about the IRS's activities, challenges, and areas that need attention or reform.

In 2023, the report indicated that the IRS made significant progress, particularly in the aftermath of the pandemic. The most notable improvements included the elimination of the backlog of paper-filed Forms 1040 and an increase in the percentage of taxpayer telephone calls answered. By the end of the year, the backlog of paper-filed Forms 1040 was virtually eradicated. The IRS also enhanced its telephone service, with the rate of answered calls rising to 29% in FY 2023, a substantial increase from 11% in FY 2021.

However, the report also highlighted several persisting challenges. The IRS continues to grapple with a backlog of individual amended tax returns and correspondence, which remains more than double their pre-pandemic levels. Furthermore, as of early December, the IRS had a backlog of approximately one million Employee Retention Credit (ERC) claims. The IRS's telephone service also faced criticism, as the metrics used to gauge performance fail to accurately reflect the taxpayers' experience. Despite a Level of Service (LOS) of 85% during the 2023 filing season, only 35% of callers managed to connect with an IRS employee during the filing season, and a mere 29% reached an IRS employee throughout the entire fiscal year. The report also drew attention to the IRS's slow response in assisting victims of tax-related identity theft. The average resolution time for self-reported identity theft cases was approximately 19 months, extending the delay for issuing refunds to the affected taxpayers.

### IRS finalizes rules on safe harbor for incorrectly filed returns

The IRS has finalized rules concerning the safe harbor protection from penalties for businesses that incorrectly file information returns or payee statements. Typically, businesses face penalties for not rectifying inaccurate information returns and payee statements. However, the 2015 PATH Act provides a provision that waives penalties for minor errors, though taxpayers can choose to bypass this safe harbor, necessitating businesses to file corrected returns.

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The newly issued rules provide more details on when the payee can choose not to use the statutory safe harbor rules and offer additional definitions. The IRS and the Treasury Department have clarified that the adjusted basis reporting on the 1099-B form should align with the corrected 1099-DIV. The final rules also provide a more comprehensive definition of "tax withheld." The initial rules, which were issued in October 2018, referred to common types of taxes withheld but were not meant to be a complete list.

### IRS to resume collection notices, offers $1B penalty relief

The IRS has announced penalty relief for approximately 4.7 million individuals, businesses, and tax-exempt organizations that were not sent automated collection reminder notices during the pandemic. This relief amounts to about $1B, primarily benefiting those earning under $400,000 a year. The IRS temporarily suspended the mailing of automated reminders to pay overdue tax bills starting in February 2022 due to the pandemic. The IRS will resume normal collection notices for tax years 2020 and 2021 and will issue a special reminder letter starting next month. The IRS will also waive the failure-to-pay penalties for eligible taxpayers for tax years 2020 and 2021. This relief is automatic, and taxpayers who have already paid their full balance will also benefit from the relief. The IRS will begin sending automated collection notices and letters from January 2024.

### Record $26M in fines levied by wage division despite lowest enforcement actions in a decade

The US Labor Department's Wage and Hour Division, which oversees federal minimum wage, child labor, overtime, and other labor laws, has reported a record $26 million in fines against employers in 2023, despite having the lowest enforcement actions in a decade. The agency concluded 20,215 compliance actions and recovered about $212.3 million in back wages in Fiscal Year (FY) 2023. Despite fewer cases, the agency fined employers a 10-year-high of $25.8 million for violations of federal labor laws in 2023. The agency is currently facing a probe over its response to a surge in child labor violations and is struggling with a record low number of investigators. The Biden administration has requested a nearly $81 million boost for the wage division in 2024.

### US Labor Department increases civil penalty amounts for federal labor law violations effective January 15

The US Labor Department is increasing civil penalties for federal labor law violations effective January 15. The penalties for wage and overtime violations will rise from $2,374 to $2,451, and for illegally withholding employees' tips from $1,330 to $1,373. Non-compliance with the Family and Medical Leave Act's posting requirements will incur a penalty of $211, up from $204. Child labor violations will attract a penalty of $15,629, up from $15,138, and if such a violation results in death or serious injury of an under-18 employee, the penalty will be $71,031, up from $68,801. Repeated or willful violations causing death or serious injury will attract a penalty of $142,062, up from $137,602. These new penalties apply to assessments made on or after January 15.

### US State Department revises foreign per diem rates for government and business travel

The US State Department has recently revised the foreign per diem rates for more than 90 locations, with the changes taking effect from January 1, 2024. These rates represent the highest tax-exempt reimbursement amounts that can be issued to US government employees who are traveling overseas on official duties. The IRS also permits US-based employers to apply these rates for employee business travel expenses that are paid under an accountable plan. The rates are comprised of a maximum allowance for lodging and a maximum allowance for meals and incidental expenses (M&IE). The maximum per diem rates for foreign countries are determined based on the costs reported in the Hotel and Restaurant Survey, which is submitted by US government posts in foreign regions. These rates are updated on a monthly basis and become effective on the first day of each month.

### IRS increases exempt wage amounts for federal tax levies in 2024

The IRS released the 2024 Publication 1494 on December 18. This publication is used to determine wage amounts exempt from federal tax levies. The exempt amounts, which are based on the number of dependents and filing status an employee claims, have increased from 2023. Publication 1494 is used in conjunction with IRS Form 668-W, Notice of Levy on Wages, Salary, and Other Income, which an employee uses to indicate their number of dependents.

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### IRS finalizes 2024 Form W-4, restores reference to tax withholding estimator

The IRS has finalized the 2024 version of Form W-4, Employee's Withholding Certificate, on December 15. The 2024 form is more similar to the 2022 version as it reinstates references to the IRS's Tax Withholding Estimator. Furthermore, placeholder amounts in the form's worksheets, which were present in the draft released on September 29, have now been filled in.

Additionally, the IRS finalized the Spanish edition of the 2024 Form W-4 on December 27. This final form has been updated to incorporate the dollar amounts for 2024. The Spanish version of the 2024 Form W-4, also known as Certificado de Retenciones del Empleado, continues to carry the updated form name that was initially introduced in the draft version on October 6.

### IRS releases final 2024 Form W-2 and variants with no changes from second drafts

The IRS has released the final versions of the 2024 Form W-2 and its variants for American Samoa, Guam, and the US Virgin Islands on December 19. These forms, including the 2024 Form W-2, Wage and Tax Statement, and Forms W-2AS, W-2GU, and W-2VI, did not undergo any changes from their second drafts, which were released on December 14.

### IRS finalizes Publication 15 and 15-A for 2024, Spanish version pending

The IRS has finalized Publication 15 and 15-A for use in 2024, as announced on December 20. These publications serve as the primary federal tax guide and its supplement. Starting from 2024, Publication 15 will cater to all employers, including agricultural employers and those in US territories, as the IRS has discontinued separate tax guides for these groups. Although a Spanish version of Publication 15 is planned for the 2024 edition, it was not immediately available at the time of the announcement. The Spanish version of Publication 15-A, however, is not planned.

### IRS releases unchanged Final 2024 Federal Income tax withholding methods

The IRS released the final 2024 Publication 15-T, Federal Income Tax Withholding Methods, on December 19. There were no changes from the second draft, which was dated December 13.

### IRS releases unchanged final 2024 Form W-4S for third-party sick pay

The IRS released the finalized version of the 2024 federal withholding certificate for third-party sick pay on December 22. The final 2024 Form W-4S, titled 'Request for Federal Income Tax Withholding From Sick Pay', remained unchanged from the draft version that was released on December 19.

### IRS releases final 2024 Form W-4P, restores tax withholding estimator option

The IRS released the final 2024 Form W-4P, a withholding certificate for periodic pension and annuity payments, on December 13. The form reinstates the IRS's Tax Withholding Estimator as an option for individuals, particularly in Step 2(a), which was previously reserved for future use. The form's draft placeholders have been replaced with actual amounts in the Step 4(b) deductions worksheet.

### IRS releases updated Spanish version of Form SS-8 and accompanying instructions

The IRS released the finalized update to the Spanish-language version of Form SS-8 and its accompanying instructions on January 5. This form is utilized by the IRS to determine a worker's employment status. The Spanish version of Form SS-8, titled "Determinacion del Estado de Empleo de un Trabajador para Propositos de los Impuestos sobre la Nomina y Retencion de Impuestos sobre los Ingresos Federales," and its instructions are the same as the English versions that were released on December 12. The last revision of Form SS-8 was in May 2014, while the instructions for the form were last updated in March 2023. No changes were made from the English version.

### IRS releases draft instructions for 2024 Form 941: COVID-19 credits removed

The IRS has issued draft instructions for Form 941 and its associated schedules, which are anticipated to be used throughout all four quarters of 2024. Notably, Form 941, the Employer's Quarterly Federal Tax Return, has seen changes including the elimination of lines for reporting qualified sick and family leave wages. The IRS explained

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in Form 941's draft instructions, "because it would be extremely rare for an employer to pay wages in 2024 for qualified sick and family leave taken after March 31, 2020, and before Oct. 1, 2021," such claims should be directed to Form 941-X, the Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund. The Allocation Schedule for Aggregate Form 941 Filers, known as Schedule R, has reverted to the format used in the March 2022 revision. Columns that were previously related to Covid-19 credits have been marked as reserved for future use or altered to refer to lines on Form 941-X. Additionally, the IRS has removed guidance on adjusting tax liability for the nonrefundable portion of Covid-19 credits from the draft instructions for Schedule B, the Report of Tax Liability for Semiweekly Schedule Depositors.

## State updates

### Georgia updates employee's withholding allowance certificate

The State of Georgia made updates to their form G-4, *State of Georgia Employee's Withholding Allowance Certificate*. The form no longer applies allowances to each employee's filing status. The form still allows additional allowances to be calculated by using the worksheet included with the form.

### Idaho State Tax Commission adopts IRS standards for e-filing

The Idaho State Tax Commission has adopted IRS standards for e-filing, pending review from the state legislature, that would require all companies filing 10 or more W-2's and other informational returns to utilize e-filing. This will reflect the current requirement outlined in Section 6011 of the IRC.

### Updates to Idaho withholding certificate

The State of Idaho released their updated Form W-4, *Employee's Withholding Allowance Certificate*. The updates were necessary to make the form W-4 correspond with the figures in Idaho's withholding methods.

### Occupational tax changes for Kentucky municipalities

Four Kentucky municipalities implemented changes to their occupational tax methods, effective January 1, 2024. They are as follows:

- The City of Bowling Green increased the occupational tax rate from 1.85% to 2%.
- Hardin County made no rate changes, but will extend its Industrial Tax District to include all unincorporated parts of the county.
- Kenton County has lowered the employer withholding rate in the county to 0.6997% of wages.
- Mercer County has increased the occupational tax rate from 0.45% to 1%.

### Maryland County tax rate changes

The State of Maryland has announced changes to county tax rates via their withholding guide.

### Massachusetts requires withholding on 4% high-earner surtax

Massachusetts implemented a 4% surtax for high-earning individuals making at least $1 million in 2023. When the surtax was voted in on November 8, 2022, it was decided that the $1 million threshold would be increased annually to reflect inflation, adjusting the threshold for 2024 to $1,053,750. Because of this, a change in the withholding methods were announced on January 2nd, 2024, effective January 1st, 2024, with the release of Massachusetts Circular M.

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## Meet our Employment Tax professionals: Peter Carney and Sam Raiyah

Peter Carney is an associate in our Chicago office. Since starting in October 2023, Peter has assisted in a variety of issues including corrective reporting at the federal level, notice resolution, and state payroll tax issues. In his free time, Peter enjoys cooking, reading, and playing the guitar.

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Sam Raiyah is an associate with our team in New York City and has been with the firm since November 2023. He assists clients with federal, state, and local payroll tax needs, 'work from anywhere' considerations, and 1099 reporting and compliance. Outside of work, Sam enjoys backpacking, teaching foreign languages, and exploring NYC's vegetarian cuisine.

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