Payroll Insights

Employment tax news to guide you now and for the future

May 2024

John's *fresh take*: 2020 Is finally closed...or is it?

Employment tax returns are generally subject to a three-year statute of limitations. For example, on April 15, 2024, the normal statute for 2020 expired. All Form 941-X adjustments had to be submitted to the IRS by that date in order to be considered timely. This includes the Employee Retention Credit claims.

However, in a new twist, the IRS extended the statute of limitations for claims related to the second half of 2021 by two years from the issuance of any refund to seek repayment in court, despite the expiration of the general three-year statute of limitations.

Due to the Employee Retention Credit claims, a special five-year statute of limitations applies to IRS assessments for the third quarter of 2021. The ERC and the corresponding statute of limitations has been the subject of several pieces of legislation:

- The Taxpayer Certainty and Disaster Tax Relief Act of 2020 extended the ERC through the first half of 2021.
- The American Rescue Plan Act of 2021 modified the credit and extended it through the end of 2021. The statute of limitations was then extended to 5 years for ERC claims for the second half of 2021.
- The Infrastructure Investment and Jobs Act retroactively repealed the credit as of the end of the third quarter of 2021. The statute of limitations remains extended to 5 years for ERC claims.

On September 14, 2023, the IRS announced that **IRS Commissioner Danny Werfel ordered an immediate moratorium** on processing new ERC claims. The moratorium is still active according to the IRS. As of December 9, 2023, the IRS has a Form 941-X backlog of 1,057,000 forms.

On March 11, 2024, the Treasury Department issued the 2025 General Explanations of the Administration's Fiscal Year 2025 Revenue Proposals, also known as the "Greenbook". This includes a proposal to apply the five-year statute of limitations on employee retention credit tax assessments to all the quarters for which the credit was available.

Payroll Insights will continue following the pending revenue proposals in order to determine if the two-year extension of the statute applies to 2020 as well as the 2021.

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Federal updates

The COVID-19 Fraud Enforcement Task Force ("CFETF") has issued its 2024 report

The COVID-19 Fraud Enforcement Task Force ("CFETF") has issued its 2024 report, which touts significant accomplishments, but also issues a stark warning to Congress. The report states that the CFETF's coordinated approach has led to enforcement successes, including criminal charges against more than 3,500 defendants, civil enforcement actions resulting in more than 400 civil settlements and judgments, and more than $1.4 billion in seizures and forfeitures. However, nothing is without its challenges. Budget constraints have made it difficult to provide adequate resources to the CFETF, the statute of limitations is running out, and the Pandemic Response Accountability Committee (PRAC), a body of 20 federal Inspectors General overseeing pandemic relief spending, is due to sunset next year. Director Galdo warns that "[i]f we fail to provide the necessary PRAC data to CFETF agencies or neglect to extend the statute of limitations, our agents and prosecutors won't be able to finish the job—losing the opportunity to recoup hundreds of millions of dollars in fraud proceeds."

Expansion to Federal overtime rules

A new federal overtime rule, which is expected to expand overtime pay for millions of workers, has cleared the White House Office of Management and Budget. Salaried employees who make more than a certain amount of money per year, and work in a "bona fide executive, administrative, or professional capacity" are exempt from the Fair Labor Standards Act's overtime requirements that stipulate an employer must pay time-and-a-half for any hours worked over 40 hours per week. The new overtime rule changes the exemptions for overtime eligibility under the Fair Labor Standards Act by raising the eligible salary threshold from an annual salary of less than $35,568 to an annual salary of $55,000 (which is subject to change).

Business groups are already pushing back, as they are likely to see increased payroll costs under this new rule. A previous attempt to raise the salary threshold of the overtime test to $47,476 was blocked in 2017.

Federal ban on non-competition agreements ("non-competes")

The Federal Trade Commission ("FTC") narrowly voted to ban nearly all noncompete agreements which are employment agreements that typically prevent workers from joining competing businesses or launching ones of their own. The FTC estimates about 30 million people, or one in five American workers, are bound by non-competes.

The U.S. Chamber of Commerce has stated quickly after the FTB announcement that it would sue the FTB to block the rule, calling it unnecessary. The rules will not become effective until 120 days after publication of the Federal Register which was issued on April 23, 2024.

The rule bans all new non-competes, including with senior executives, after becoming effective and there is a "grandfathering" exception for existing non-competes with "senior executives," defined to include very high-level, "policy-making" officers meeting certain salary thresholds.

The only exemption to the Final Rule is non-competes that are entered into in connection with the sale of a business.

By the effective date of the rule, employers will be required to provide written notices to relevant employees informing them that their non-competes are unenforceable and will not be enforced.

The Final Rule preempts conflicting state laws, thus banning otherwise lawful employee noncompete clauses in the 46 states that permit them.

Currently, California, Minnesota, North Dakota, and Oklahoma have full bans on non-competes while several other states have restrictions on non-competes based on the income level of the employee. 25 states currently have other restrictions that are non-income based while 12 states have no restrictions.

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State and local updates

Kentucky approves voluntary paid family-leave program for employers

Kentucky HB 179, which went into effect on April 5, 2024, allows insurers to provide paid family leave insurance and disability income insurance as an insurance product. While employers are not obligated to offer these insurance types, they can be a valuable addition to an employee's benefits package.

Only insurance companies that sell life or health insurance can provide these types of insurance. Employers have the option to purchase either insurance as part of a group policy, standalone policy, or as an addition to an existing policy.

This bill also stipulates that paid family leave insurance policies must clearly outline the requirements for paid leave, including any unpaid waiting period, the duration of available benefits, and the calculations for determining these benefits. Policies must provide benefits for at least two weeks during a 52-week period.

However, the policies may limit benefit amounts under certain circumstances, such as if an employee fails to provide proper notice and medical certification, works for remuneration, or they're eligible to receive remuneration from the employer. Employees may also be ineligible for benefits if they are receiving unemployment insurance benefits, worker's compensation, or paid time off from their employer.

Missouri Department of Revenue raises interest rate for unpaid taxes

Effective May 30th, the **Missouri Department of Revenue** is increasing the interest rate for unpaid taxes from 6% to 9% for calendar year 2024. The increased rate applies to delinquent individual income, corporate income, trust income, sales and use, property, and excise taxes.

Oregon's minimum wage is set to increase July 1st

Oregon's **standard minimum wage** is set to increase by $0.50 on July 1st. Each year, Oregon's minimum wage is indexed to inflation based on the Consumer Price Index published by the United States Bureau of Labor Statistics.

The standard minimum wage will increase from $14.20 to $14.70. However, the minimum wage in the Portland metro area will increase from $15.45 to $15.95, and from $13.20 to $13.70 in nonurban counties.

Pennsylvania adopts federal rules for dependent care assistance contributions

On December 13, 2023, Pennsylvania legislature enacted House Bill 1300, now Act 34, adopting the federal exclusion from wages for contributions of up to $5,000 ($2,500 for married filing separately) made to a dependent care assistance program (as defined in the Internal Revenue Code Section 129).

Due to the late adoption of the exclusion, employers may not have had time to adjust employees' Pennsylvania taxable wages or income tax withheld in 2023. Recognizing this limitation, the Pennsylvania Department of Revenue recently issued guidance for correcting 2023 reporting to account for the new exclusion from wages. Pursuant to the guidance, an employer should amend the employee's Form W-2, *Wage and Tax Statement,* to reduce Pennsylvania taxable wages by the lesser of actual contributions to a qualifying dependent care assistance program and the statutory limitation. There should not be a reduction in Pennsylvania income tax withheld. Any excess withholding will be considered in the employee's tax balance with their personal income tax return.

Employers should confirm their payroll tax calculations for 2024 have accounted for the new exclusion from wages.

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West Hollywood, California, is postponing minimum wage increase

West Hollywood, California, is **postponing the minimum wage increase** that was supposed to be effective July 1st. According to the April 15th update on the city's website, the minimum wage rate of $19.08 per hour and current Leave Provisions will remain in effect for the remainder of calendar year 2024. Going forward, the City Council intends to increase the city's minimum wage rate annually on January 1st instead of July 1st.

Income tax reciprocity may be on the horizon for Wisconsin and Minnesota

Wisconsin, which currently has income tax reciprocity agreements with Illinois, Indiana, Kentucky, and Michigan, will conduct a study on the impact of implementing income tax reciprocity with Minnesota. Reciprocity agreements typically require taxpayers to pay taxes only in their state of residence on income earned in the other state. The study will consider various factors such as the number of residents in each state who earn income in the other, the total amount of income earned in each state by the impacted taxpayers, and the total tax waived by each state if reciprocity was restored. The study must be submitted to the legislature and the governor of each state no later than December 31, 2024.

Contact us

John Montgomery
National Employment Tax Lead Partner
T: 212-872-2156
E: jmontgomery@kpmg.com

Reagan Aikins
Managing Director, Employment Tax
T: 703-286-6596
E: raikins@kpmg.com

Mindy Mayo
Managing Director, Employment Tax
T: 408-367-5764
E: mindymayo@kpmg.com

Manan Shah
Managing Director, Employment Tax
T: 404-739-5247
E: mananshah@kpmg.com

Jon Stone
Managing Director, Employment Tax
T: 408-367-1983
E: jwstone@kpmg.com

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