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Payroll Insights

Employment tax news to guide you now and for the future

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John's *fresh take*: IRS operations during COVID-19, Form 941 processing

The IRS recently updated its website to announce that it is now opening mail within normal timeframes. As of February 2, 2022, the IRS reported having 1.5 million unprocessed Forms 941, *Employer's Quarterly Federal Tax Return*. It advised that tax returns are opened in the order received. If taxpayers file electronically and receive an acknowledgment, they do not need to take any further action other than promptly responding to any requests for information.

As of February 2, 2022, the total inventory of unprocessed Forms 941-X was approximately 444,000, some of which cannot be processed until the related Forms 941 are processed. While not all these returns involve a COVID credit (e.g., Employee Retention Credit, sick, family, and/or vaccine leave credits) the inventory is being worked at two sites (Cincinnati and Ogden) that have trained staff to work possible COVID credits.

IRS issues guidance on early termination of ERC

The Infrastructure Investment and Jobs Act (enacted November 15, 2021) amended the employee retention credit (ERC) and generally limited the ERC to wages paid before October 1, 2021, unless the employer is a "recovery startup business." The legislation effectively ended the ERC as of September 30, 2021, for the majority of businesses, but retained the ERC between July 1 and December 31, 2021, for recovery startup businesses that pay qualified wages.

Because this legislation was effectively retroactive, there are employers that acted in reliance upon the existing law to reduce payroll deposits or to receive advance payments related to the ERC. IRS Notice 2021-65 provides guidance for employers on the early termination of the ERC if the employer received an advance payment or reduced deposits in anticipation of the credit. Under the notice, employers that received advance payments for fourth quarter wages may avoid failure to pay penalties if they repay those amounts by the due date of their applicable employment tax returns.

Employers that reduced deposits on or before December 20, 2021, for wages paid during the fourth quarter of 2021 in anticipation of the ERC should not be subject to a failure to deposit penalty if:

1. The employer reduced deposits in anticipation of the ERC;
2. The employer deposits the amounts initially retained in anticipation of the ERC on or before the relevant due date for wages paid on December 31, 2021 (regardless of whether the employer actually pays wages on that date); and
3. The employer reports the tax liability resulting from the termination of the employer's ERC on its employment tax return or schedule that includes the period from October 1 through December 31, 2021. Employers should refer to the instructions to the applicable employment tax return or schedule for additional information on how to report the tax liability.

Failure to deposit penalties will not be waived for employers if they reduce deposits after December 20, 2021.

If an employer does not qualify for relief under Notice 2021-65, they may reply to a notice about a penalty with an explanation of the situation and the IRS may consider reasonable cause relief under section 6656(a).

IRS tax calendars for 2022

The finalized 2022 version of Publication 509, *Tax Calendars*, was released on December 10 by the IRS. This publication includes a calendar for employers, a general tax calendar, and a calendar specifically for excise taxes.

In addition, the publication noted that Juneteenth National Independence Day, June 19, was established as a federal holiday in 2021 and will be observed on Monday, June 20, in 2022.

Lastly, also included are the payment deadlines for amounts of the employer and employee portions of Social Security tax that were deferred in 2020. Half of the payment of the employer portion is due by January 3, 2022, while the rest of the portion is due by January 3, 2023. Deferred amounts of the employee portion should have been withheld over the course of 2021 and should be fully repaid to the IRS by January 3, 2022.

District of Columbia emergency COVID-19 leave law

Under a new emergency law signed by Mayor Muriel Bowser, DC Act 24-209, DC employees are entitled to paid leave for taking time off work to receive and recover from a COVID-19 vaccine. The law became effective on November 18 and will remain in effect for no longer than 90 days.

Requirements include:

- Employers must provide two hours of paid leave to employees for them or their children to receive a Covid-19 vaccination and an additional eight hours of paid leave during the 24-hour period following the vaccination injection for the vaccine recipient to recover from any side effects.
- Paid leave for employees to receive and recover from the Covid-19 vaccine must be in addition to paid leave the employer already provides and must be compensable to employees at their regular rate of pay.
- Employees must provide reasonable notice to employers when taking paid leave related to a Covid-19 vaccination, but employers cannot require employees to provide notice more than 48 hours in advance.
- Employees are not entitled to more than 48 hours of such paid leave per year.
- Additionally, employees are entitled to leave, paid or unpaid, if they are unable to work because:
  - The employee tested positive for Covid-19 or is caring for a family member or individual who tested positive;
  - A health care provider recommended that the employee self-quarantine;
  - The employee must care for a family member or individual in the same household who is isolating or self-quarantining because of Covid-19; or
  - The employee must care for a child whose school or place of care closed due to Covid-19 or whose childcare provider is unavailable due to Covid-19.
  - Employees may not use more than 16 weeks of such leave in the two years following the effective date of this law.
  - Reasonable notice must be provided to employers when employees take leave because they are unable to work due to Covid-19.
- In the case of an emergency, employees must notify their employer within 24 hours after leave is taken.
- Employers may request that employees provide documentation upon their return from leave related to Covid-19 that demonstrates the need for the leave.
- Employers that willfully violate this law will be subject to a $1,000 penalty for each offense.

United States: IRS guidance on withholding taxes paid by employer

On January 14, 2022, the IRS released a Chief Counsel Advice memorandum addressing whether an employer is eligible to receive a refund of income tax withholding paid on behalf of a tax-equalized assignee on a foreign assignment in a year after the calendar year in which the employer paid the compensation to which the income taxes are attributable. The legal memorandum concludes that when an employer pays a tax-equalized assignee a stated amount of compensation and pays the federal income-tax withholding attributable to that compensation on behalf of the employee, the income taxes the employer pays to the IRS are considered withheld from the assignee, and thus may not be refunded to the employer after the calendar year in which wages are paid.

Why this matters

The IRS memorandum provides insight into how the IRS views both the tax equalization process and hypothetical tax calculation commonly utilized in mobility programs. It confirms that withholding based on a hypothetical tax calculation is not an "administrative error," thus reaffirming the IRS's longstanding view that an employer may not generally correct an over-collection of income taxes after the close of the tax year.

The IRS memorandum underscores how important it is for mobility programs to have a reasonably accurate hypothetical tax estimate and to work to correct over-payments before year-end.

Overview of Chief Counsel advice

This appears to be one of the first IRS memorandums to directly address the impact of global-mobility tax-compliance processes (such as the tax equalization process and the hypothetical tax calculation) on an employer's federal income tax reporting and withholding obligations. Notably, the IRS memorandum considers whether an employer's payment of a specific amount of income tax withholding to the IRS based on a hypothetical tax estimate is an "administrative error" when the employer determines after the end of the calendar year that the amount paid to the IRS was excessive. While an employer is generally not able to correct an overpayment of income tax withholding after the close of the tax year, an overpayment due to an "administrative error" may be corrected after the close of the tax year.

The IRS memorandum concludes that an employer's payment of a specific amount of income tax withholding to the IRS based on a hypothetical tax estimate is not an "administrative error" when the employer determines after the end of the calendar year that the amount paid to the IRS was excessive. Thus, the federal income taxes withheld and remitted to the IRS may not be refunded to the employer after the calendar year in which the wages were paid.

Local Tax on Nonresident Income

The Buckeye Institute, an Ohio think tank, has asked the Ohio Supreme Court to review an appellate court decision that allows localities to collect income taxes on nonresidents working from home due to the COVID-19 pandemic. Under section 29 of H.B. 197 under state law, during the state of emergency (originally declared March 9, 2020) an employee is deemed to be working at their employer's principal place of business while working from home due to the pandemic. Thus, local tax should be withheld based on the employer's location and not the employees' true physical location. H.B. 110 amended the provision in June 2021 to only apply to withholding requirements, and not municipal income tax. The Buckeye Institute has challenged the Ohio Appellate Court's ruling that this law (and previous rulings upholding its application) applies to all aspects of local income tax, and not just withholding, arguing that prior analysis of municipal taxation by the Supreme Court had determined that taxation should be based on the actual location of the work performed. The National Taxpayers Union Foundation and members of the Ohio General Assembly have voiced their support for The Buckeye Institute's case and the State Supreme Court's review of the appellate decision.

https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2021/2021-Ohio-4196.pdf

State Updates

Similar to guidance on how to properly process and file year-end returns, states have started issuing guidance on 2022 employment tax rates and rules. Employers should be working with their tax teams and payroll providers to ensure the proper set-up as we enter the new tax year.

Alaska

According to the Department of Labor and Workforce, Alaska's unemployment-taxable wage base is to increase from $43,600 to $45,200 for 2022.

Arizona

Arizona's range of withholding rates is unchanged for 2022. The 2022 version of Form A-4, Employee's Arizona Withholding Election, was released on December 9 by the state revenue department.

Colorado

The Colorado Department of Revenue has created Form DR 0004, Colorado Employee Withholding Certificate, to assist employees with their state withholding.

Delaware

The Delaware Department of Labor has reduced the 2022 unemployment insurance taxable wage base to $14,500 from $16,500 in 2021.

Hawaii

Unemployment Tax

According to the Department of Labor and Industrial Relations, Hawaii's unemployment-taxable wage base is to increase from $47,400 in 2021, to $51,600 in 2022. As in 2021, unemployment tax rates are to be determined with Schedule D for 2022.

Disability

According to the Department of Labor and Industrial Relations, effective January 1, 2022, the taxable wage base is set to increase from $1,102.90 in 2021 to $1,200.30. The wage base is a weekly maximum taxable amount instead of an annual amount.

To fund a temporary disability insurance plan, employers may deduct from an employee's wages up to half of the premium cost for covering the employee. The amount deducted may not exceed $6 per week in 2022, and employers are liable for the rest of the plan's cost.

Idaho

According to the Labor Department, Idaho's unemployment-taxable wage base is set to increase from $43,000 to $46,500 for 2022.

In addition, in comparison to 2021 unemployment tax rates, which were from .207% to .691% for positive-rated employers and from 1.245% to 1.936% for negative-rated employers not assessed the maximum rate, the rates have increased and are now from .252% to .84% for positive-rated employers and from 1.512% to 2.352% for negative-rated employers not assessed the maximum rate for 2022.

Illinois

According to the Department of Employment Security, Illinois unemployment-taxable wage base is not subject to change.

Iowa

The Iowa unemployment insurance taxable wage base has increased by $2,400 to $34,800 starting in 2022.

Kansas

According to the State's Labor Department, Kansas unemployment tax rates are not to change for 2022.

Louisiana

The Louisiana Department of Revenue has kept the wage base unchanged at $7,700.

Michigan

According to the State Treasury Department, Michigan's withholding allowance is set to increase for 2022, from $4,900 to $5,000.

The state's flat tax rate should be unchanged at 4.25%.

Minnesota

According to the Department of Employment and Economic Development, Minnesota's unemployment tax costs are set to increase in 2022 due to higher tax rates and supplementary assessments.

Experience rates, new employer rates, and base rates, are all set to change for 2022.

In addition, Minnesota's unemployment-taxable wage based is set to increase from $35,000 in 2021 to $38,000 in 2022.

Missouri

According to Missouri's Revenue Department, compared to the 2021 formula, the 2022 formula decreases the highest tax rate from 5.4% to 5.3%. The supplemental tax rate also decreased from 5.4% to 5.3%. The tax brackets used in the formula were also adjusted.

The standard deductions increased from $12,550 to $12,950, for single employees and married employees whose spouses work or are filing separately. The deductions increased from $25,100 to $25,900 for married employees whose spouses do not work, and from $18,800 to $19,400 for heads of households.

Nebraska

According to the State's Labor Department, Nebraska's unemployment tax rates for experienced employers are to decrease in 2022.

Effective January 1, 2022, unemployment tax rates for positive-rated employers are to range from zero to 1.05%, compared with zero to 1.08% in 2021.

New Mexico

According to the Department of Workforce Solutions, New Mexico's unemployment-taxable wage base is set to increase from $27,000 to $28,700 for 2022.

New York

Withholding methods for New York State and the City of Yonkers, effective Jan. 1, 2022, were released November 30 by the state Department of Taxation and Finance.

The withholding methods add a third method for high earners, which was first included in the draft version of the methods released September 27.

If an employee earns enough annual income to be subject to the third method, which is $1,077,550 for single individuals or $2,155,350 for married individuals, the third method would be used for their withholding instead of the exact calculation method, the department said.

In addition, the supplemental withholding rate for New York state is 11.7% and the supplemental rate for Yonkers residents is 1.95975%, the department said. These rates are lower than the temporary rates of 13.78% and 2.30815% in effect for the second half of 2021, but higher than the rates of 9.62% and 1.61135% in effect through June 30, 2021. The Yonkers supplemental rate for nonresidents was unchanged at 0.5%.

North Carolina

North Carolina's income tax rate is set to decrease on January 1, 2022, among other changes made in the states' recent budget bill, according to the state revenue department in the 2022 withholding guide.

The statutory income tax rate is to decrease to 4.99% from 5.25%. The tax rate used for withholding is 0.1% points higher than the statutory rate, signifying the withholding rate and supplemental flat rate in 2022 is 5.09%, down from 5.35%.

The standard deductions used in the withholding formulas increased from $16,125 to $19,125 annually for heads of households, and from $10,750 to $12,750 annually for other filing statuses. The value of a state allowance was unchanged at $2,500 annually.

The additional withholding amounts required of employees who fill out Form NC-4 NRA, *Nonresident Alien Employee's Withholding Allowance Certificate,* also are to increase.

In addition, Form NC-3, *Annual Withholding Reconciliation*, is required to be filed by the last day of month following the end of the quarter in which a business closes, instead of within 30 days of the last payment of wages. North Carolina has increased the unemployment insurance taxable wage base from $26,000 to $28,000.

North Dakota

North Dakota's 2022 withholding methods were released December 9 by the state tax commissioner's office.

North Dakota's 2022 withholding methods continue to accommodate all Forms W-4, pre- and post-2020.

The value of an allowance for a pre-2020 Form W-4, *Employee's Withholding Certificate*, was $4,300, which was unchanged from 2021.

Ohio

Unemployment Tax

According to the Department of Job and Family Services, effective Jan. 1, 2022, total unemployment tax rates are to increase for experienced employers: from 0.8% to 7.5% for positive-rated employers and from 7.7% to 10.2% for negative-rated employers.

School District Income Tax

Ohio school district income tax rates, effective January 1, 2022, were released December 9 by the state taxation department.

Two new taxes took effect on January 1, 2022.

— Pike-Delta-York Local School District, in Fulton County: 1% tax rate and a traditional tax base; and

— Sidney City School District, in Shelby and Logan Counties: 0.75% tax rate and an earning income only tax base.

In addition, Preble-Shawnee Local School District, in Preble, Butler, and Montgomery Counties, increased its tax rate to 1.75% from 1%.

Effective November 10, the governor's office confirmed that the unemployment tax rates will not increase for 2022.

Oklahoma

The Oklahoma unemployment insurance taxable wage base is set to increase by $800 to $24,800 starting in 2022.

Oregon

Based on Oregon's Revenue Department, compared to the 2021 formulas, the value of a state allowance in the 2022 formulas increased from $213 to $219. The state standard deductions increased from $4,700 to $4,840 for married employees and for single employees who claim at least three allowances, and from $2,350 to $2,420 annually for other single employees.

The maximum amount of federal withholding that can be subtracted from wages increased from $7,050 to $7,250. The Oregon unemployment taxable wage base is set to increase by $3,900 to $47,700 starting in 2022.

South Carolina

The 2022 South Carolina tax rates for businesses will decrease or remain unchanged from their 2021 levels due to legislative action taken in 2020. For 2022 there will be no solvency surcharge imposed. The unemployment taxable wage base remains at $14,000.

Texas

According to the Workforce Commission, Texas unemployment tax rates are not subject to change for 2022.

Utah

The Utah Department of Workforce Services has increased the unemployment insurance taxable wage by $2,700 to $41,600 for 2022.

Washington

Washington's Department of Labor and Industries released its 2022 list of workers' compensation payroll tax rates by risk code and fund.

Washington's Governor Inslee signed a bill that will delay the start of the long-term care payroll tax until July 1, 2023. The reason for delay according to lawmakers is "areas that need adjustments." Once this does take effect, people who work in Washington will pay 0.58% of earnings into the fund.

Employers may withhold from wages the employee portion of the workers' compensation payroll tax. The list, released November 30, indicates for each risk classification the default employee withholding rates for employers with an experience-modification factor of one.

Rates generally increased for the first time since 2017, and the average rate in 2022 is $1.53 per $100 of payroll.

In addition, effective January 1, 2022, the total contribution rate for the family-leave insurance program will increase from .4% to .6%.

The percentage split for employer and employee contributions will also change. In 2021, employers paid 36.67% and employees paid 63.33%, while 26.78% of the total premium due, and employees will pay 73.22% in 2022.

Meet one of our Employment Tax professionals: John Choi

John is a seasoned Manager in KPMG's Employment Tax practice based in Stamford, Connecticut. He has 10 years of employment tax experience and holds a Certified Payroll Professional designation. John specializes in large, in-house client work, assisting clients with reconstructing and replenishing their payroll departments. John enjoys helping clients find harmony between their Payroll, Human Resources, and Information Technology Departments to ensure a cohesive, efficient, well-oiled machine that puts their employees first.

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