



Payroll Insights

Employment tax news to guide you now and for the future

June 2022



John Montgomery's fresh take: Considerations for employers contemplating downsizing

Economic uncertainty may result in payroll and HR departments preparing themselves for eventual downsizing of their employer's workforce. If downsizing occurs, there are many areas that payroll and HR departments must address quickly. Many states have guidelines on when you must pay your termed employees (see below), what must be included in the final paycheck, and the ordering of any deductions. In addition, thought may be given to how the downsizing will affect the company's unemployment insurance rates going forward. Severance payments may be paid and the tax calculations associated with those payments need to be performed. Will the severance be lump sum or continuation and will it be taxed at supplemental rates or using the W-4 method of withholding? These are a few things to consider when contemplating a downsizing.



Payroll considerations for termed employees

With the current volatility in the job market, it's a good time to remember that the employment tax and payroll rules around termination pay can vary by state. **Federally**, there is not a requirement to pay an employee immediately, but it is best practice that the individual receive payment at least by the regular payday for the last period worked.

Some states do have stricter rules for the timing of final pay and other benefits that may be triggered when an employee departs a company. Most recently, Maine enacted **L.D. 225** on April 7 requiring employers with more than 10 employees to pay all unused vacation pay accrued on or after January 1, 2023 upon termination. This rule extends to employers (with 10 or more employees) that sell their business, and the payment must be made within 2 weeks.

Highlighted below are a few states with specific rules on termination payment and/or notification requirements.

- **California:** Wages must be paid on termination, if employee provided at least 72 hours advance notice and depart on the day indicated in the notice. For terminations with no notice, payment is due within 72 hours. All vested vacation time that is unused is required to be included in the final pay.



- **Connecticut:** Employers are required to pay wages on the next business day following the termination, unless the employee instigates the departure. For employees choosing to resign, wages must be paid in full no later than the next regular pay day. Accrued fringe benefits, such as vacation, holiday, sick days, must be included in the final pay.
- **Georgia:** Currently has no provisions on payment owed to employees under voluntary termination.
- **Maryland:** Generally, employers are required to pay wages to discharged or voluntarily terminated employees on or before the day on which the employee would have been paid the wages if the individual had not separated from the company. Leave may not be required to be paid out depending on the employer's policy.
- **Nebraska:** Employers are required to pay wages, which includes vacation leave plans, to discharged employees on the next regular payday or within 2 weeks, whichever is earlier.
- **New York:** Employers must pay wages on the next regular payday for employees who quit or who are discharged. While no employee has a statutory right to vacation pay under NY regulations, NYS law does require employers to pay all benefits that were agreed to under the individual employment agreement or policy.
- **Pennsylvania:** Payments to discharged employees or voluntary departures must be made by the next regular payday. While there is no provision under PA law on vacation pay, there may be a legal requirement to provide the benefits as detailed in the employer's policy.
- **Wisconsin:** Employers are required to pay wages to all terminations on the next regular payday or in 31 days, whichever is earlier. Vacation time is payable dependent on employer policies or practices, written or established. Wages are defined as remuneration payable to employees for personal services, which includes holiday and vacation pay.

The rules for deceased, suspended, or furloughed employees can also include specific requirements and timing/reporting deadlines.



Employee retention credit update

While there have continued to be processing delays in reviewing employee retention credit (ERC) claims, the [IRS Commissioner told Congress on March 17](#) that the IRS plans to process the backlog by the end of 2022. To accomplish this goal, the IRS plans to hire additional workers to help ensure that the backlog does not continue into tax year 2023. The large influx of returns and employee attrition were cited as reasons for the increased processing time.

In our experience, delays are generally at least 6 months for the majority of our clients with some taking over a year to resolve. We are seeing more of the 2021 filed claims get processed within a couple of months, so the delay appears to be mostly confined to the 2020/early 2021 backlog.



IRS statement on leave-based donations to Ukraine

On May 19th, the IRS released [Notice 2022-28](#) to clarify that employer leave-based donations made through the end of 2022 to aid Ukraine will be exempt from inclusion as income or wages for both the employee and employer. The donations must be made to an [IRC Section 170\(c\)](#) qualified organization that supports the efforts in Ukraine. Relevant amounts should then be excluded from Boxes 1, 3 (if applicable) and 5 of the employee Form W-2, *Wage and Tax Statement*.

As the donations will be excluded from taxable income, employees won't be eligible to claim the value of the donation as charitable contribution deductions on their personal returns. This announcement follows precedent for charitable relief, such as notices issued after the September 11 terrorist attacks.



Updates to federal unemployment loans and state responses

More states have begun to release updates on repayment of “Title XII loans” that may have been taken out to help cover deficits in their state unemployment insurance (SUI) trust funds. When the states don’t repay, or choose to delay payment, the state becomes subject to a [reduction in FUTA tax credits](#).

Provided below is an overview of the jurisdictions who have had some movement on this issue:

- Colorado has pending legislation that includes discussion on repayment of the loans. [SB 22-234](#) is in draft as of April 29.
- Minnesota is planning to repay the loan under [measure S.F. 2677](#). This was signed by the governor on April 29h.
- New Jersey has introduced [Senate Bill 644](#) to address the repayment of the federal loan.



IRS statement on destroyed information returns

On May 13, the IRS released a [statement](#) regarding the 1% of 2020 tax documents that were destroyed due to a software limitation, to make space for the 2021 filing season. This issue mostly relates to documents, primarily Form 1099s, that were submitted to the IRS via paper. System constraints and other issues related to 2020 were cited as reasons for the choice to prioritize processing taxpayer returns over paper forms that were not yet processed by the end of 2021.



IRS releases draft Form 941-X Instructions

The IRS released draft [instructions](#) for Form 941-X, *Adjusted Employer’s Quarterly Federal Tax Return or Claim for Refund* on April 27. The updated guidance includes reminders about the end of several employment tax credits related to COVID-19, including those related to qualified paid leave, employee retention credit, and COBRA premium assistance.



2023 Health Savings Account limits released

The IRS is increasing the tax-free contribution limits for health savings accounts for 2023, as announced on April 29. [IRS Revenue Procedure 2022-24](#) outlines the details of the increases – \$200 for self-coverage and \$450 for family coverage. The new limits under a high-deductible health plan will be \$3,850 for self-coverage and \$7,750 for family coverage.

A high-deductible health plan will be defined in 2023 as having an annual deductible of at least \$1,500 for self-coverage and \$3,000 for family coverage. Annual out-of-pocket expenses, such as co-payments and deductibles, should not exceed \$7,500 for self-coverage and \$15,000 for family coverage.



Delaware signed Paid Family Leave Law

On May 10, the Delaware Governor signed [Senate Substitute 2 for SB 1](#) to guarantee paid family and medical leave. The measure will provide up to 12 weeks of paid time off annually for eligible workers to care for new children, or up to six weeks in a two-year period for workers medical problems, family member illnesses, or reasons related to family members’ military duty. Payroll tax deductions are set to begin Jan. 1, 2025, and the state will start paying benefits in 2026.

The eligibility rules are most similar to the federal Family and Medical Leave Act (FMLA): the employee must have worked for the same employer at least 12 months and worked at least 1,250 hours in the past year to be eligible for paid leave. However, in Delaware, only employers with fewer than 10 employees won’t be required to participate. Employers with 10 to 24 employees are only required to participate in the parental leave benefit, and those with more than 25 employees must participate in the full program.



Georgia amends employment definition

Georgia has enacted H.B. 389 that will be effective July 1 to amend its employment definition, establish worker misclassification penalties, and provide industry specific exceptions. Individuals providing services for wages are considered employed unless they are engaged in an independently established trade/occupation/profession, and free from control or direction over the performance of their work. The bill provides guidance on the specifics of how to determine if an individual is free from control or direction, including, setting their work schedule, accepting other work without consequence, and no geographic restrictions, etc.

There are industry-specific exceptions noted for ride-share companies and music industry professionals. For the ride-share industry, in order for the individuals to not be deemed employees, companies cannot set schedules, mandate a number of hours, require transportation service requests, or restrict individuals from working for other ride-share or delivery companies. For the music industry, individuals will not be considered employees if they can exercise discretion in the performance of services, set their own hours/schedule, and are not employees for federal or state tax purposes.

The civil penalties for misclassification and failure to make unemployment insurance contributions may range from \$2,500 to \$7,500 for each affected worker under the new bill. The state labor commissioner may use frequency to decide the penalty amount, and has the right to waive penalties, fines, or assessments.



Meet one of our Employment Tax professionals: Anne Williams

Anne is an associate in KPMG's New York City office, with 1.5 years of employment tax experience. As a Certified Public Accountant, Anne assists many clients with work from anywhere consulting matters, 1099 reporting compliance, and quarterly and annual reporting compliance at the federal, state, and local levels. Anne enjoys continuing to work with clients on their employment tax needs in today's ever-changing payroll climate.

Anne enjoys spending time with her family in Vermont and is looking forward to getting in as much time at the beach as possible this summer.

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