Payroll Insights

Employment tax news to guide you now and for the future

June 2021

John's Fresh Take: New York State

New York State Department of Taxation and Revenue has responded to several NYS nonresidents filing for refunds on their 2020 personal income tax returns. The state is denying those refunds and requesting additional information from the nonresidents.

As the state continues to enforce and watch compliance with their nonresident and convenience of the employer taxation regulations, the state is requiring the employee to submit:

- A 2020 wage and tax statement (Form W-2);
- A letter from the employer on official letterhead to include:
  - the total number of days the employee worked during 2020;
  - the number of days worked in New York State during 2020;
  - the number of days worked outside of New York State during 2020;
  - the employee's primary office location in 2020;
  - why the amount of New York State taxes was withheld from wages (e.g. a Form IT-2104.1 or other allocation formula);
  - the signature of an authorized representative with contact number;
  - a breakdown of the amount reported in box one on the wage and tax statement (Form W-2) (for example wage income, severance payments, sick pay, vacation pay, stock options, deferred compensation);
  - an indication by the employer of the portion of any bonus pay received sourced to New York State.

Once all of the information is received, the state will again review the case again to determine refund eligibility.

Federal

Acting US Solicitor General Urges SCOTUS Not To Review New Hampshire's Remote Worker Case

In the past year, many companies have adopted work anywhere policies that allow employees to perform services remotely in locations where they may not have primarily been providing those services previously. In October 2020, the Massachusetts Department of Revenue issued an emergency regulation stating that nonresidents who were working remotely but who had previously worked in the state will continue to pay Massachusetts income tax in what is known as a "status quo" approach. Seek definitive guidance on the constitutionality of certain taxes on remote workers, New Hampshire filed a claim in the Supreme Court of the United States (SCOTUS) challenging Massachusetts' COVID-19 policy of imposing Massachusetts income tax on New Hampshire residents who worked at offices in Massachusetts pre-pandemic but have been working remotely in New Hampshire during the pandemic. New Hampshire argues that Massachusetts' emergency regulation violates both the Commerce Clause and the Due Process Clause of the U.S. Constitution.

However, Acting US Solicitor General filed a brief urging SCOTUS not to review New Hampshire's specifically noting as follows: The motion for leave to file a bill of complaint should be denied. This is not an appropriate case for the exercise of this Court's original jurisdiction, which the Court has repeatedly stated should be exercised only "sparingly." *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (citation omitted). New Hampshire does not invoke the types of interests that would warrant such an exercise, and the issues New Hampshire seeks to present can adequately be raised and litigated by New Hampshire residents who are subject to the Massachusetts income tax. In addition, the constitutional claims would more appropriately be considered on developed factual records concerning affected individuals and with the benefit of authoritative interpretations of the relevant tax provisions by Massachusetts courts.

For all filings related to this case, see:
https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22o154.html

Dependent Care Benefits

The Internal Revenue Service (IRS) has issued **Notice 2021-26** clarifying the tax treatment of dependent care benefits available in tax years 2021 and 2022 due to the carryover or extension of a claims period under §214 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020. Dependent care benefits that would have been used and excluded from income during the preceding tax year will remain excludable from wages for employees in 2021 and 2022. These extended benefits should not apply to the annual limits of other dependent care benefit contributions under Internal Revenue Code (IRC) §129 for tax years 2021 and 2022.

Draft Instructions for Form 941-X, 943-X (PR)

The IRS has issued **draft instructions for Form 941-X, Adjusted Employer's Quarterly Federal Tax Return**, in order to align with the changes to Form 941 for tax year 2021. Changes include extending the Employee Retention Credit (ERC) and the qualified sick and family leave wages credit, as well as removing the deferral of portions of Social Security tax that had not been extended to 2021. Employers providing paid leave for sick and family COVID-related reasons may continue to claim credits for wages paid before April 1, 2021. For wages paid for leave taken after March 31, 2021, but before September 30, 2021, a credit may also be taken, but with a modified calculation under the American Rescue Plan Act. Finally, the ERC was extended to certain tax-exempt organizations affected by qualified disasters in 2020. This credit should be claimed using Form 5884-D, Employee Retention Credit for Certain Tax-Exempt

Organizations Affected by Qualified Disasters, which is filed in conjunction with Form 941. These draft instructions are not final and the IRS plans to release additional updates in July 2021 for changes made by the American Rescue Plan. The July 2021 revision of the form should be used to correct quarters following March 30, 2020.

In addition, the IRS also released **updated instructions for Form 943-X(PR), Adjusted Employer's Annual Federal Tax Return for Agricultural Employees or Claim for Refund**, to allow for corrections to credits related to COVID-19. Similar to the Form 941-X, the credits included on the Form 943-X (PR) include those for sick and family leave wages and the ERC. Also included is the deferral of the employer portion of Social Security tax for 2020. The revised forms and instructions include changes to lines for reporting data in relation to the nonrefundable and refundable portions of COVID-19-related tax credits, and take into consideration any credit advancements paid via Form 7200, Advance Payments of Employer Credits Due to COVID-19.

IRS Virus Relief

The IRS has issued **Notice 2021-24**, which extends the relief period for late deposits of withheld taxes due to employees affected by COVID-19. The relief, originally granted in March 2020, has been extended through September 30, 2021, for the sick and family leave credits and through December 31, 2021 for the employee retention credit. This time should allow employers to continue to pay qualified sick leave wages, family leave wages, and COBRA continuation payments for employees in need.

State Guidance

Connecticut

Connecticut introduced **S.B. 1106** proposing the establishment of a voluntary payroll tax on employee wages for all tax years beginning January 1, 2022, and forward. The additional tax would require employers to pay a tax of 5% on the wages of each employee who elects to participate in the program. Those participating would then be eligible to take an offsetting credit and an income tax deduction for Roth IRA contributions on their personal income tax return for the applicable tax year. As of April 27, the bill has not been passed by the Connecticut State Legislature and faces both criticism and support from state officials and employers. A formal announcement and decision regarding the implementation of the proposed tax are expected to be made soon..

Connecticut has also just passed **HB 6633**, which now heads to the Senate. It is an act restructuring unemployment insurance benefits and to improve the state's fund solvency

Key components of the bill include:

- Increasing the taxable wage base from $15,000 to $25,000.
- Reducing the maximum solvency tax rate from 1.4% to 1%.
- Reducing the minimum and expanding the maximum experience tax rate, respectively, from 0.5 and 5.4% to 0.1and 10%.
- Increasing the minimum base period earnings required to qualify for unemployment benefits from $600 to $1,600.
- Delaying four annual $18 increases in the maximum weekly benefit amount.
- Deferring unemployment insurance benefits until the end of any severance payments for all employees.

Indiana

Indiana has enacted **Public Law 97** to update state provisions related to payroll service providers. Under the new law, the Department of Revenue may notify registered payroll providers and employers within 7 days if their withholding payments and/or filings are past due for certain periods. It would require providers to register annually with the state and identify all responsible persons of the provider. These responsible persons will be both personally and criminally liable for their commitment to remit withheld taxes on behalf of employers to which they provide payroll services.

Kentucky

On April 7, the **Kentucky Office of Unemployment Insurance announced** that unemployment tax rates and the unemployment taxable wage base for 2021 were released. The rates will range from 0.3% to 2.4% for positive-rated employers and from 6.5% to 9% for negative-rated employers. The rate increases are substantive and are geared to combat the effect of the increased unemployment insurance payouts. New employer rates will remain at 2.7% for standard employers and 9% for construction employers with out-of-state headquarters. Finally, the taxable wage base for 2021 will be $10,800, lowered from an originally reported base of $11,100.

New Jersey

On May 7, 2021, **The New Jersey Department of the Treasury developed a list of actions** to be taken in response to the 2019 report published by the New Jersey Task Force on Employee Misclassification. The first action targets construction contracting notifications. The Division of Property Management and Construction has added guidance to its Standard General Conditions for construction bidding and highlights the importance of employee classification on all requests for proposals (RFPs). The second action includes the addition of language to the Standard General Conditions relating to bid solicitation. Vendors submitting bids for work with the state must attest to their knowledge and compliance with state laws regarding employee classification. The Department of Labor will have the authority to investigate any potential violations and assess penalties as necessary.

The third action will include the coordinated effort between the Division of Taxation (DOT) and Department of Labor (DOL) to investigate potential misclassifications. In addition, the DOT has provided data to the DOL regarding potential misclassifications by employers as well as information related to COVID-19-related programs. Finally, the DOL has provided 150 DOT employees with training relating to identifying worker misclassification and ways to address potential misclassification issues. This cross-training between departments will continue and be presented to all new field investigators in order to mitigate the number of misclassifications going unnoticed by either department.

New York

On April 19, Gov. Andrew Cuomo signed **New York's fiscal 2022 budget**, which included an increase in penalties for failing to provide complete withholding information. The new penalty imposed on employers applies to those who fail to provide complete information to the state via Form NYS-45, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return. Employers will be required to pay $100 per employee up to a maximum penalty of $20,000 per quarter, for incomplete quarterly returns filed June 1, 2021 and later.

Oregon

On May 3, proposed changes to Oregon rules on employee penalties for incorrect withholding certificates were published in the **Oregon Bulletin**. Under the proposed changes, a penalty of $500 would be assessed on employees if their Form OR-W-4, Oregon Employee's Withholding Statement and Exemption Certificate, includes incorrect or insufficient information related to exemptions or includes tax but the employee failed to file a tax return for that year. If an employee files an insufficient Form OR-W-4, the state revenue department may determine a rate of withholding for the employee until the employee files a new form. A hearing on this proposal is scheduled for May 25 and any comments are due before the hearing.

Virginia

On March 30, Virginia Gov. Ralph Northam signed **H.B. 2063** to require employers to pay overtime to eligible employees working greater than 40 hours in a workweek. Eligible employees who work more than 40 hours in the week will be paid overtime compensation at a rate of at least 1.5 times their regular rate of pay. This rate is to be calculated as the hourly pay rate plus any other overtime wages paid for the workweek, less any federal exclusions, divided by total hours worked in the week. For salaried employees, the regular rate should be calculated as one-fortieth of all wages paid for the week. Penalties for failure to pay overtime wages to eligible employees will be the same as those in place for failure to pay wages. The statute of limitations will be 3 years.

Washington

Under the Long-Term Services and Supports Trust Act, beginning January 1, 2022, employers will be required to collect and remit a payroll tax of 0.58% of WA based employees' wages to the Employment Security Department (ESD), which will fund the trust providing benefits for qualified beneficiaries beginning January 1, 2025.

An employee may opt out of paying the tax and receiving long-term care benefits if the employee has purchased long-term care insurance before November 1, 2021, and applies for an exemption with the ESD from October 1, 2021, through December 31, 2022. The coverage must meet the requirements listed under Revised Code of WA Section 48.83.020 in order to be considered qualifying long-term care coverage. If the department approves the exemption, the exempt employee must provide written notification to the employee's current and future employers of the approved exemption. Once the employee notifies, the employer must not collect the tax.

By October 1, 2021, educational materials will be provided to employers by the ESD and the Department of Social and Health Services to ensure employees are aware of the program and that the premium assessments will begin on January 1, 2022. In addition, a public website information that explains the program and premium assessment would be provided.

West Virginia

On April 9, West Virginia Gov. Jim Justice signed **H.B. 2026** to add a 30-day threshold before nonresidents are subject to income tax for work performed in the state, beginning in 2022. Employees are exempt from West Virginia withholding for the first 30 working days in the state during the year. In order to qualify, the employee's state of residence must have a similar exemption or no income tax. The bill will use an employer's time and attendance data to determine the amount of time and wages earned by an employee within the state for the year. If an employer's system does not provide sufficient information about the employee's work location per day, then the employee will be required to submit a written estimate of the expected number of West Virginia workdays for the year. The bill will go into effect on June 28, 2021, but will only be applicable for tax year 2022 and forward.

Meet one of our Employment Tax professionals: Samantha-Jo Marciliano

Each month we will highlight an Employment Tax professional so you can get to know the team better. This month's tax professional is Samantha-Jo Marciliano. She is a senior manager in KPMG LLP's NY Employment Tax Practice and has been with the firm for over 12 years. She is a Certified Payroll Professional, Enrolled Agent, specializing in employment tax. Her most memorable and rewarding assignments include assisting clients with developing future policies around work from anywhere or multi-state withholding. Lastly, she has 3 children and a puppy named Duke! They love to go to the park and blow bubbles for Duke to catch and pop! They are looking forward to the summer 2021!

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