Payroll Insights

Employment tax news to guide you now and for the future

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John's *fresh take*: The ERC saga continues...

Over the past few months, Payroll Insights has chronicled the latest events in the Employment Retention Credit (ERC) saga…. and evolution of the ERC continues. The ERC was created to provide employers the ability to pay their employees during the hardships of the COVID-19 pandemic. However, a tidal wave of fraudulent claims has flooded the IRS, requiring counter measures. In response to the abuse of the program, the IRS issued an ERC moratorium on 9/14/23 (IR-2023-169), halting the processing of claims that had not been approved prior to the issuance of the moratorium. In an attempt to lessen the number of fraudulent claims to be reviewed and enforced, the IRS announced on 10/19/23 (IR-2023-193) a new withdrawal process for employers who weren't confident that their claims were valid. On 12/21/23, the IRS doubled-down on their attempt to avoid criminal enforcement of these fraudulent claims by announcing the Voluntary Disclosure Program (IR-2023-247). The program allows employers who already received their ERC credits but believe their claim might be invalid, to repay the credit at a 20% discounted rate.

The IRS previously stated claimed ERC's before the moratorium will be processed, but cautioned taxpayers that increased fraud concerns lengthens the processing time.

Since the beginning of 2024, things have only heated up. On 1/17/24, the ERC was included within the framework of a new bipartisan $78 billion tax deal. The Tax Relief for American Families and Workers Act of 2024(H.R. 7024) was introduced by the House Ways and Means Committee in January and included an accelerated deadline for all ERC claims (2020 and 2021) of 1/31/24. Representatives believe the accelerated deadline and associated enforcement provisions will lessen the number of claims to be processed. This reduced amount of claims is said to almost completely offset the entire cost of the $78 billion tax deal. Although not yet enacted, indications are that the 1/31/24 deadline will remain even if eventually enacted due to the funding offset mechanism within the bill. The House Ways and Means Committee Report related to the bill goes one step further and proposes to deny any amendments to claims post 1/31/24. This created a massive rush by employers to submit their ERC claims before the proposed 1/31/24 deadline.

On Thursday February 15, before the House Ways and Means Committee, IRS Commissioner Danny Werfel told lawmakers the tax legislation would help the IRS manage a mountain of claims it's been struggling to sort through. Werfel claimed that the IRS received about 17,000 to 20,000 claims just last week (post the 1/31/24 deadline). "The inventory is growing," he said, adding that his agency is processing 1,000 to 2,000 claims a week and has paid out about $1 billion of the claims.

On 1/31/24 (coincidentally the same day as the proposed accelerated ERC deadline), the $78 billion tax deal took one step closer to becoming law when the House passed the bipartisan tax deal 357-70. After passing through the House, the tax bill moved to the Senate where it faces many challenges as Congress considers government funding as well.

A resolution to the ERC moratorium might not come to fruition until some point in March or April. The moratorium bill has not passed and as of this date the statute to file Form 941-X, Adjusted Employer's Quarterly Federal Tax Return or Claim for refund to claim the ERC is April 15, 2024. Needless to say, there will be more to come regarding the never-ending ERC saga.

Federal updates

Deadline for ERC Voluntary Disclosure Program: March 22, 2024

March 22nd is the deadline for taxpayers to apply for the Employee Retention Credit Voluntary Disclosure Program (VDP).The IRS has provided the opportunity for employers who received the credit but were ineligible, to voluntarily repay the credit at 80% of the credit received. The benefits and requirements of the program are:

- Voluntary repayment of 80% of the credit received,
- Cooperate with any requests from the IRS,
- Sign a closing agreement
- No interest charged,
- The 20% relief of payment is not considered taxable income,
- The IRS will not assess penalties or interest on the ERC payment if paid in full (less the 20%) by the time the closing agreement is signed,
- The employment tax return (941) won't be examined for the ERC for the tax periods resolved the ERC-VPD. Other items are the return are still subject to examination.

Entities who are currently under examination or criminal investigation by the IRS are not eligible for the VDP. The VPD is for companies who have already received the ERC. If a company has filed an ERC and it has not been processed, and the company believes they are not eligible, a Form 941-X to adjust the claim should be submitted to the IRS.

Form 1099-K Fact Sheet Revised

To alleviate confusion over the proper required use of Form 1099-K, the IRS announced revisions (FS-204-33) to their Fact Sheet on February 6, 2024. Form 1099-K is an information document for Payment Card and Third-Party Transactions, which include payment apps and online marketplaces. Currently, third-party payment settlement entities are required to provide a Form 1099-K to taxpayers who receive more than $20,000 and have more than 200 transactions. The American Rescue Plan Act of 2021(ARP) (H.R. 1319) proposed a reduction to the threshold down to $600 (with no transaction requirements).

The IRS announced on November 21, 2023 (IR-2023-221) there would be a delay of the $600 reporting requirement for the 2023 Form 1099-K reporting threshold for third party settlement organizations. that 2024 would be considered another transitional year for the new $600 threshold.

A threshold of $5,000 for tax year 2024 is planned as part of a phase-in to implement the $600 reporting threshold enacted under ARP.

Birthday or holiday gifts, sharing the cost of a ride share, or paying a family member or someone else for a household bill do not apply as they are considered personal transactions.

Selling personal items such as clothes, household goods and furniture for a loss may generate a Form 1099-K, even if the seller has no tax liability from these sales.

Determining the difference in these types of transactions caused the IRS decision in delaying the reporting requirements an additional year and to plan for a threshold of $5,000 for 2024 to phase in implementation.

Updates to the Form 1040 series and related schedules for 2024, based on feedback from the tax community is planned to make it easier for taxpayers to report their transactions.

The revised fact sheet gives clarity for the use of Form 1099-K, by providing common situations on what to report, what to do on receipt of the form, and whether a taxpayer's organization should be preparing, filing, and furnishing the form.

New Independent Contractor Guidelines

New federal guidelines for distinguishing between an employee and an independent contractor will take into effect on March 11, 2024. This final ruling was announced by the US Department of Labor on January 10, 2024. The final ruling replaces the guidelines set during the Trump administration within the Independent Contractor Status under the Fair Labor Standards Act (2021 IC Rule).

The new guidelines will reinstate the previously used "Economic Realities Test", which uses multiple court precedents to support proper classification. The new worker classification attempts to analyze the totality-of-the circumstances and weighs each circumstance equally.

The Trump administration's factors for classification as an independent contractor were based on the nature and degree of control over work, the individual's opportunity for profit or loss, the amount of skill required for work, the degree of permanence of working relationship between the individual and potential employer, and whether the work is part of an integrated unit of production. Under the Trump administration, the first two factors were weighted heavier than the other factors.

Under the Biden administration, the economic realities test will take into consideration the opportunity for profit or loss depending on managerial skill, the investments by the worker and potential employer, the degree of permanence of work relationship, the nature and degree of control, the extent to which work performed is an integral part of the potential employer's business, and the worker's skill and initiative. The economic realities test decides economic dependence based on case law history. The IRS provides a link to an extensive list of Frequently Asked Questions to assist with any classification confusion.

State updates

2024 California Payroll Tax Calendar

In January, California released its Payroll Calendar for 2024. Employers are reminded that electronic submission is required for all tax returns, wage reports, and payroll tax deposits. Employers can enroll in eServices for Business to manage all their employment tax needs. The California Employment Development Department (EDD) makes clear, when a due date falls on a Saturday, Sunday, or legal holiday, the next business day is considered the last timely date. California's EDD website provides a helpful handout to breakdown California's 2024 payroll tax rates and due dates.

Connecticut Extends Filing Deadlines

On January 22, 2024, the IRS released DT-2024-01, extending 2024's federal filing due dates, in order to provide relief for residents of Connecticut who were affected by recent storms, flooding, and a potential dam breach. On February 1, 2024, Connecticut issued TSSB 2024-1, also extending their state filing deadline to align with the federal government's new due dates. Corporate Business taxes that were originally due on 5/15/2024, will now be due on 6/17/2024. Income tax withholding that was originally due on 1/31/2024 and 4/30/2024, are now due on 6/17/2024.

Florida Looking to Extend Work Hours for Teenagers

Florida lawmakers are currently in the process of passing two bills that would allow 16 and 17-year-old teenagers to work longer hours during school weeks. The proposals by Florida are the latest in a trend of states attempting to mirror Federal Child Labor Laws.

Currently, 16 and 17-year-old Florida teenagers are prohibited from working more than 8 hours on the day before a school day, and no more than 30 hours during a school week. On February 1, 2024, Measure HB 49 passed through the Florida House by a vote of 80-35. If HB 49 becomes law, it would eliminate the hours limit for teenagers 16 and up. The second measure discussed is Measure SB 460. This measure would increase the types of construction jobs an underaged worker can perform and the definition of journeyman. It also includes the types of construction jobs a minor under age 18 may work, such as scaffolding, mining, residential or nonresidential building construction, or ladder above 6 feet tall, to name a few. Minors 16 or 17 may work in a residential building construction under certain circumstances, such as earing their Occupational Safety and Health Administration 10 certification and under the direct supervision of certain persons.

Supporters of the bills say they would provide more opportunities for teenagers to earn income and work experience, while also exposing them to more career and technical skills. Opponents of the bills believe easing Florida's child labor laws would expose teenagers to greater risk of injury, and it could detract them from focusing and prioritizing their education. As of early February, Measure SB 460 was still under discussions in the Florida Senate.

New Jersey Continues COVID Era Hybrid Work Accommodations

In yet another extension of COVID-19 related legislation, New Jersey has decided to continue their current hybrid work accommodation requirements, for employers to continue to receive New Jersey jobs credits.

New Jersey jobs credits are overseen by the New Jersey Economic Development Authority (NJEDA). Prior to COVID-19, the NJEDA required employers to create full-time jobs, which were defined as positions that required an employee to spend 80% of their working hours at an in-state facility; for an employer to receive New Jersey jobs credits. When COVID-19 reared its ugly head, working on-site was nearly impossible and New Jersey reacted by enacting A. 4929 in 2022; lowering the required amount of time spent on-site to 60%. On January 12, 2024, Governor Phil Murphy(D) signed A. 5840, extending the 60% minimum requirement for another year.

The NJEDA incentive programs affected by the ruling are the Business Employment Incentive Program, the Business Retention and Relocation Assistance Grant Program, the Grow New Jersey Assistance Program, and the Urban Transit Hub Program.

New York's convenience of the Employer Rule…. not so Convenient

Since May of 2006, New York has had a remote worker tax, also known as the "Convenience of the Employer" rule. The tax has experienced greater scrutiny over the past several years as COVID-19 has altered the workplace landscape. The New York remote worker tax requires workers to pay income taxes to the state, if their job is based in New York; even though they work remotely outside of state lines. Called the "Convenience of the Employer" rule because workers must still pay the tax if they are working outside of state lines at their own convenience and not because the employer assigned them to work outside of the state.

For years states like Connecticut and New Jersey have credited back their residents' payments of the New York remote worker tax, in an effort to avoid double taxation. However, since COVID-19, these credit refunds have mounted to billions. Last year, New Jersey passed Bill A4694, incentivizing their residents to challenge the New York remote worker tax. Connecticut is looking to pass a similar bill in 2024. The Constitution State is offering a 50% credit on whatever their residents owe in Connecticut state income tax, if they can successfully challenge New York over their remote worker tax. A successful challenge would reverse a Connecticut resident's New York tax obligations, while cutting their Connecticut tax obligations in half, simultaneously.

Cincinnati Telecommuter Tax is Upheld by the Ohio Supreme Court

In a ruling issued Wednesday, February 14, The Ohio Supreme Court ruled that the Ohio General Assembly properly used its tax authority when it temporarily allowed municipalities to tax the income of telecommuters working remotely for in-city employers during the Covid-19 pandemic.

Because the law "permissibly limits an employee's home municipality from collecting municipal income taxes" under the state constitution, "and because it permissibly authorizes the municipality of the employee's principal place of work to collect municipal income taxes," it "was within the General Assembly's constitutional authority," Justice R. Patrick DeWine wrote for the 5-2 Ohio Supreme Court.

The law was challenged by a Cincinnati-based employee who argued that his employer shouldn't have continued to withhold the municipal income tax once he became to work from home during the pandemic. The city argued that the 2020 tax that was imposed was justified as the employee not only relied on his company's computer connections when working remotely but also still worked in Cincinnati itself more than half the year.

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