



Payroll Insights

Employment tax news to guide you now and for the future

September 2024



John's fresh take: It's back to school time

The kids are back in school! For many of us, that can mean multiple things: A quiet home to work in for those who are remote or hybrid, renewed traffic for those who get the joy of kid drop off or if you drive anywhere near a school, and a sense of urgency every morning as you attempt to get everyone out the door. This is also the time of year for payroll professionals to scramble around attempting to find learning hours for those who have CPE or RCH learning responsibilities.

KPMG has multiple events that can help you knock out some of the required learning while assisting you to prepare for 2025. Future editions of Payroll Insights will provide you with links to sign up for two different year-end sessions conducted by the Employment Tax group, one in conjunction with Bloomberg BNA and the other our own KPMG production. Both sessions provide education hours while discussing recent updates as well as what payroll changes are slated for 2025.

KPMG also offers webinars on a myriad of topics that are CPE eligible: Workforce mobility and employment tax (kpmg.com). The Mobility via Podcast series focuses on the demands of a global workforce. The demands on the global workforce are evolving. —How will your mobility program respond? —Is your talent and business strategy future ready? These are just some of the questions that we look into through discussions led by KPMG Global Mobility Services professionals.

Be on the lookout for our upcoming webinars and learning opportunities to make your 'back to school' and year-end flow smoothly!

Indicators of potentially inaccurate employee retention credit claims

The IRS shared a news release, IR-2024-198, on July 26, 2024 detailing five new warnings signs of incorrect employee retention credit (ERC) claims discovered while processing more than 1 million claims from September 2023 to June 2024. These issues are in addition to seven previously highlighted problem areas. The IRS urges businesses with pending or approved claims to review their filings for accuracy and consult trusted tax professionals, especially if the business used promoters to file claims.

The five additions to the warning signs are:

- Essential businesses that operated fully during the pandemic without a decline in gross receipts but were convinced by promoters to claim the ERC.



- Businesses unable to substantiate how a government order fully or partially suspended their operations.
- Reporting wages paid to family members as qualified wages, which are generally ineligible.
- Using wages already claimed for Paycheck Protection Program (PPP) loan forgiveness to claim the ERC.
- Large employers claiming wages for employees who provided services, which is not allowed under ERC rules for large employers.

The news release also details the first seven warning signs published previously. The IRS is actively denying tens of thousands of high-risk ERC claims and scrutinizing hundreds of thousands more. The agency is also processing lower risk claims to expedite payments to eligible businesses. Businesses are reminded that ERC eligibility can vary by tax period based on government orders and changes in gross receipts.

The IRS emphasizes the importance of working with knowledgeable tax professionals to navigate the complex ERC rules.

Federal updates

IRS releases second ERC voluntary disclosure program

the IRS recently released [Announcement 2024-30](#), a second Employee Retention Credit (ERC) Voluntary Disclosure Program for employers to rectify erroneous claims for credits or refunds related to the ERC. The program is designed to allow employers to avoid civil litigation, penalties, and interest by settling their tax liabilities.

The second ERC Voluntary Disclosure Program allows participants to retain 15% of the claimed ERC amount (down from 20% in the first program) and is specifically for claims filed for the 2021 Tax Period(s). Eligibility for this program requires that participants are not under criminal investigation or other specific IRS examinations related to ERC claims. Participants must repay 85% of the claimed ERC amount and are not required to reduce wage expenses on tax returns for previously claimed credits.

Procedural steps include completing Form 15434, *Application for Employee Retention Credit Voluntary Disclosure Program*, on or before November 22, 2024, repaying 85% of the claimed ERC and settling any penalties and adjustments through a closing agreement with the IRS. Participants can use the Electronic Federal Tax Payment System (EFTPS) to fulfill their payment obligations under the program. The program also outlines the handling of preparer/advisor information and the terms for possible installment agreements if full payment cannot be made immediately.

Employers receiving rejection notices for employee retention credit

Businesses are now receiving [IRS notifications](#) rejecting their Employee Retention Credit (ERC) claims, compelling them to embark on a prolonged appeals process or legal battles. Tax experts have observed inconsistencies in these rejection letters; some letters provide an option for administrative appeals while others direct businesses towards litigation. This inconsistency has created confusion, particularly for small businesses that may lack the resources to navigate these complicated procedures.

Originally intended to help businesses retain employees during the pandemic, the ERC program has been marred by fraudulent claims. In response, the IRS halted the processing of new claims in September and is currently rejecting tens of thousands of high-risk claims. Many businesses, confident in their eligibility, are receiving denial letters, prompting questions about the IRS's evaluation methods.

The reasons for denial are varied, including businesses not being recognized as a valid trade or business, failing to show a significant drop in gross receipts, or not undergoing a government-mandated suspension. Recipients say these letters often lack detailed explanations, and the appeals process can extend beyond a year. In some cases, businesses have chosen to pursue legal action in federal court to contest the denial.

In response, the IRS acknowledged the concerns from tax professionals. An internal review of the 28,000 disallowance letters indicated more than 90% were valid rejections, and the exclusion of details around the appeal process were inadvertent.

IRS comments on ERC moratorium lift

In the same August 8 news release addressing taxpayers' concerns regarding denial letters, the IRS provided an update for processing valid claims. The IRS announced that they are working on paying out 50,000 "low-risk" claims and expect the payments to be mailed beginning in September. The news release does not define a "low-risk" claim.

Additionally, the IRS will now begin processing claims that were filed between September 14, 2023 and January 31, 2024. The focus will be on the low and high-risk claims. The reviews are conducted by quarter, not by business entity, so a business may receive a refund for one quarter while its other claims are still in review. The news release does not mention timing for processing ERC claims filed After January 31, 2024.

Uber driver worker classification: closed but not settled

In 2016, three Pennsylvania UberBlack drivers filed a case against Uber Technologies Inc. alleging that they had been misclassified as independent contractors under the Fair Labor Standards Act (FLSA) and should have been classified as employees. Under the FLSA, employees are generally covered for minimum wage, overtime pay, and other employment protections. Gig economy companies, such as Uber, have been sued numerous times across the country for FLSA violations by workers who say the company exerts sufficient control over their services to be considered an employer. So far, there have been many settlements but few cases that can be cited as legal precedent.

In the case of the three UberBlack drivers (*Ali Razak, et. al. v. Uber Technologies Inc., et. al.*), after 6 years of settlement discussions, the suit was brought to a jury on March 4, 2024. Following a hung jury, it was retried on June 10, 2024. After another hung jury, both parties filed post-trial motions with the District Court. In response, the District Court dismissed the suit with prejudice, stating that whether the UberBlack drivers should be employees or independent contractors is an "intractable" question, and the "'either-or' determination simply does not comport with the nature of the gig economy, at least as it pertains to UberBlack."

State updates

California minimum wage increase

In an [official letter, dated August 1, 2024](#), the California Department of Finance announced an increase in the state's minimum hourly wage. Effective January 1, 2025, the minimum wage in California will rise to \$16.50 per hour from \$16 per hour in 2024 for all employers.

Denver, Colorado minimum wage increase

On August 1, the Denver Department of Finance [announced](#) an increase in the city and county's minimum hourly wage rates. Effective January 1, 2025, the minimum wage in Denver, Colorado, will be raised to \$18.81 per hour from \$18.29 in 2024. In addition to the general minimum wage increase, there will be a specific adjustment for tipped food and beverage workers. Starting January 1, 2025, these workers will have a minimum wage of \$15.79 per hour, provided they earn at least \$3.02 in actual tips. As of now, in the year 2024, the minimum wage in Denver stands at \$18.29 per hour.

District of Columbia PFL tax rate increase Effective July 8, 2024, the District of Columbia increased its Paid Family Leave (PFL) contribution tax rate from 0.26% to 0.75% as part of the *Fiscal Year 2024 Revised Local Budget Emergency Act of 2024*. The first payment at the new rate is due October 31, 2024 for wages paid in the third quarter (July—September).

Massachusetts telecommuting case decided

Scott E. Sakowski, an attorney for the National Oceanic and Atmospheric Administration (NOAA) in Massachusetts, was denied a Massachusetts state tax refund for income earned while telecommuting from New Hampshire during the Covid-19 pandemic. In *Scott E. Sakowski v. Commissioner of Revenue*, the Massachusetts Appellate Tax Board [ruled](#) 4-1 on July 8, 2024 that Sakowski's job duties and tax withholdings remained consistent despite his remote work and, therefore, Massachusetts had the right to impose income tax on the relevant wages.

The Board cited several Federal cases that provided a state authority to impose tax on services performed outside of the state, including *South Dakota v. Wayfair, Inc.*, which was adjudicated in the Federal Supreme Court and found that, for sales tax purposes, physical presence in a state is not required for the state to have the right to tax activities related to business within the state.

The Board also cited *In the Matter of the Petition of Edward A. and Doris Zelinsky* to support its decision for the appellee (the Massachusetts Commissioner of Revenue). This case was heard by the New York Tax Division of Appeals, who upheld New York's similar telecommuting rule for individuals who were required to telecommute from their home outside of New York due to the COVID-19 pandemic.

Sakowski contended that his work was not based in Massachusetts, but the Board highlighted his employment ties to the state and the services Massachusetts provided during the pandemic. Massachusetts Appellate Tax Board Commissioner, Nicholas D. Bernier, dissented, arguing that the regulation should only apply to in-state businesses and telework prompted by Massachusetts' Covid emergency.

Minnesota minimum wage increase

In the year 2024 and in previous years, the state of Minnesota has implemented a two-tiered system for determining minimum wage rates, distinguishing between "large employers" and "small employers." Under this system, large employers were required to pay their employees a minimum wage of \$10.85 per hour, while small employers were obligated to pay a lower minimum wage of \$8.85 per hour.

However, starting on January 1, 2025, Minnesota will transition to a unified minimum wage rate for all employers, regardless of their size. This new standardized minimum wage will be set at \$11.13 per hour.

Pennsylvania resident denied New York tax refund

In Determination DTA No. 830731, a Pennsylvania resident was **denied** a refund of approximately \$7,300 in New York income taxes for 2020 due to the New York Convenience of the Employer Rule. The resident worked from home during the COVID-19 pandemic, but his employer, INVNT LLC, did not require the employee to work from their residence when it closed its New York City office for several months in 2020.

The New York State Division of Tax Appeals ruled that the employee worked from home out of convenience, not necessity, making him liable for New York personal income tax on wages for services performed in connection with their New York employment. The fact that the employee could not perform services in the New York office was not sufficient to make the employee's residence a bona fide home office.

New York plans changes to withholding returns for tax year 2025

On July 26, the New York State Department of Taxation and Finance **announced** changes to the quarterly withholding and unemployment tax return process, effective March 2025. Key updates include:

- **Separate Reporting:** Employers must report New York state, New York City, and Yonkers withholding separately for each employee on Form NYS-45.
- **Unified Filing:** All parts of Form NYS-45 (unemployment tax, income tax withheld, and wages/withholding) must be filed together.
- **Combined Reporting:** "Wages" and "other wages" will be reported on a single return.
- **Amended Returns Online:** Employers can file amended returns online for Forms NYS-45 and NYS-1, but must resubmit the entire return, not just corrections.
- **Bulk Filing Service:** A new bulk filing service will be introduced, and the 1000-employee limit for the Web File application will be removed.

These changes aim to streamline the filing process and improve accuracy in reporting.

Tennessee unemployment rates

According to the Tennessee Labor and Workforce Development Department, unemployment tax rates will stay the same for the second half of 2024. Detailed in the [premium rate table](#), from July 1, 2024, through December 31, 2024, tax rates for experienced employers will continue to be based on Premium Table 6. Positive-rated employers are assigned tax rates between 0.01% and 2.3%, while negative-rated employers are assigned tax rates ranging from 5% to 10%.

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