EYE ON WASHINGTON

Timely, topical insights on a variety of payroll and reporting issues.

Detailed Look at State, Local and Federal Updates

Topics covered in this issue:

State/Territory/District

Colorado Requires EITC Notification

On March 31, 2023, Colorado House Bill 1006 was signed into law requiring that employers notify employees of the availability of the federal and state earned income and state child tax credits (EITCs).

The Details:

Effective with the January 1, 2023, tax year, the enacted legislation requires that employers provide a written notice at least once a year regarding the availability of the federal and state earned income and state child tax credits.

An employer may send the required notice electronically, such as by email or text message. The written notice must be in English and any other language the employer uses to communicate with employees and must include any additional content that the Colorado Department of Revenue (DOR) prescribes.

Next Steps:

Employers should review Colorado **House Bill 1006** and be on the lookout for additional information from the DOR. A written notice (hard copy or electronically) should be provided no later than the end of 2023, and thereafter annually.

Retroactive Paid Family Leave Payroll Deductions Prohibited in Colorado

The Family and Medical Leave Insurance Program (FAMLI) division of the Colorado Department of Labor and Employment has issued a **reminder** that missed FAMLI employee payroll deductions cannot be made retroactively.

The Details:

The reminder states that if an employer failed to deduct the employee share of the premium from wages paid during any pay period after January 1, 2023, the employer will be considered to have elected to pay that portion of the employee's share.

7 Colo. Code Regs. § 1107-1-1.5 states in part as follows:

"Employers ability to deduct premiums from employees **1.** An employer required to remit premiums pursuant to C.R.S. 8-13.3-507 may not deduct more than the maximum allowable employee share of the premium from wages paid for a pay period. **(a)** If an employer fails to deduct the maximum allowable employee share of the premium from wages paid for a pay period, the employer is considered to have elected to pay that portion of the employee share under C.R.S. 8-13.3-507, and the employer cannot deduct this amount from a future paycheck of the employee for a different pay period."

However, when an employee has insufficient wages to cover their share of FAMLI premiums for the pay period, an employer is allowed to deduct the uncollected employee portion from one or more future pay period paychecks.

Next Steps:

Should an employer fail to deduct the employee's share of the FAMLI premium (except in cases where the employee had insufficient wages to cover their share), they are considered to have elected to pay the employee's premium share and may not deduct wages from any future paycheck to make up the missed FAMLI deduction.

Maryland Increases Minimum Wage on an Expedited Basis

Senate Bill 555/House Bill 549 has been enacted in Maryland that increases the minimum wage to $15.00 per hour effective January 1, 2024.

The Details:

Under previously enacted legislation, the minimum wage was to be increased to $15.00 per hour effective January 1, 2025, for employers with 15 or more workers, and to the same amount for employers with less than 15 employees effective July 1, 2026.

Senate Bill 555/House Bill 549 also provides the following provisions:

- The cash minimum wage for tipped employees remains at $3.63 per hour.
- The minimum wage for employees under the age of 18 will increase to $12.75 per hour in 2024 (85% of the state minimum wage in effect).
- Removes the requirement that the minimum wage be adjusted annually against the Consumer Price Index (CPI) beginning in 2025.

Next Steps:

Employers in Maryland, regardless of how many employees they have, must pay a minimum wage of at least $15.00 per hour effective January 1, 2024.

Michigan Amends Nondiscrimination Law

Michigan has enacted legislation (Senate Bill 4) that will amend the Elliott-Larsen Civil Rights Act (ELCRA) to expressly prohibit discrimination in employment based on sexual orientation or gender identity or expression. Senate Bill 4 takes effect **June 14, 2023**.

The Details:

By way of background, the Michigan Supreme Court ruled in 2022 that the ELCRA's prohibition on sex discrimination includes discrimination on the basis of sexual orientation and gender identity.

Senate Bill 4 amends the ELCRA to codify the ruling and expressly prohibit all employers in Michigan from the following based on an individual's sexual orientation or gender identity or expression:

- Refusing or failing to hire or recruit an individual.
- Firing an individual.
- Otherwise discriminating against an individual regarding employment, compensation, or a term, condition or privilege of employment.
- Limiting, segregating or classifying an employee or applicant for employment in a way that deprives them of an employment opportunity.

Senate Bill 4 defines "gender identity or expression" as having or being perceived as having a gender-related self-identity or expression, whether or not associated with an individual's assigned sex at birth.

Note: In 2020, the U.S. Supreme Court ruled that federal law, which covers employers with 15 or more employees, already prohibits such discrimination.

Next Steps:

- Review policies and practices to ensure compliance with the law.
- Train supervisors and others involved in making employment decisions on the law.

New Jersey Enacts Bill of Rights for Temporary Workers

New Jersey has enacted legislation (Assembly Bill 1474), the "New Jersey Temp Worker Bill of Rights," (the "Bill") which increases the rights of certain temporary workers. The law is set to take effect on August 5, 2023, with a few provisions that begin on May 7, 2023.

The Details:

Assembly Bill 1474 provides significant additional rights to certain workers who are placed in temporary roles at third-party client employers by temporary help service firms.

Under the Bill, staffing firms must pay temporary laborers assigned to work for a third-party client the same average rate of pay and equivalent benefits as a permanent employee that performs the same or similar work of the third-party client.

The Bill also prohibits staffing firms or a contract, or agent of such, from charging a fee to a temporary laborer to transport them to or from the designated worksite.

Note: Temporary employment is a duration that is clearly stated to all parties at the time of referral and is either fixed as some definite agreed period of time or by the occurrence of some specified event.

Covered Workers:

The Bill provides additional rights to a temporary worker of a New Jersey-based firm that contracts with a temporary help service firm to be assigned to perform work in the following occupations:

• Certain Protective Service Workers;	• Helpers, Construction Trades;
• Food Preparation and Serving;	• Installation, Maintenance and Repair;
• Building and Grounds Cleaning and Maintenance;	• Production;
• Personal Care and Service;	• Transportation and Material Moving; or
• Construction Laborers;	• Any successor categories the Bureau of Labor Statistics (BLS) may designate.

See the **text of the law** for exceptions.

Note: Staffing firms located, operating or transacting business within New Jersey may not make any designated classification placements unless they are certified by the Director of the Division of Consumer Affairs.

Employer Pay Statement Requirements:

Each time a temporary laborer is paid, the firm must provide the worker a detailed, itemized statement (on a paycheck stub or on a form approved by the commissioner) that includes:

- The name, address and telephone number of each third-party client where they worked. **Note:** If this information is provided on the worker's paycheck stub, a code for each third-party client may be used if the temporary worker has access to the required information for all third-party clients;
- The number of hours worked at each third-party client each day during the pay period. **Note:** If the temporary laborer is assigned to work at the same worksite of the same third-party client for multiple days in the same workweek, the firm may record a summary of hours worked at that third-party client's worksite, if the first and last day of that work week are identified as well;
- The rate of payment for each hour worked, including any premium rate or bonus. Overtime pay must be paid in accordance with the law;
- The total pay period earnings;
- The amount and purpose of each deduction made by the firm, including the worker's food, equipment, and withheld income tax, Social Security deductions, contributions to the state unemployment compensation and disability benefits trust funds and every other deduction;
- The current maximum amount of a placement fee which the temporary help service firm may charge to a third-party client to directly hire the temporary laborer; and
- Any additional information required by the commissioner.

The temporary help service firm must also disclose to each affected temporary laborer on a wage statement and notice form "the maximum amount of a fee that shall be charged to a third-party client by the temporary help service firm, and the total amount of actual charges to the third-party client for the worker during each pay period compared to the total compensation cost for the temporary laborer, including costs of any benefits provided."

Note: Employers should refer to the **law** for the current maximum amount of a placement fee which a firm may charge a third-party client to directly hire the temporary worker.

Annual Earnings Summary:

The firm also must provide:

- Each worker with an annual earnings summary by February 1 of each year.
- Notice to workers of the availability of the annual earnings summary by:
  - Including a notice at the time of wage payment; or
  - Posting a notice in a conspicuous place of public reception.

Notice Requirements:

Under the law, firms are also required to provide the following notice:

Dispatch Notice:

When a firm agrees to send a worker on an assignment, they must provide the worker, at the time of dispatch, a written statement approved by the commissioner that includes **specific, itemized information** regarding the terms and conditions of the engagement. It must also state whether the assignment can be accepted at the firm's office or remotely by telephone, text, email or other electronic exchange.

Note: The firm must provide the notice on the first day of the assignment and each day a term of employment changes.

Multi-day Assignments:

For multi-day assignments, a firm must provide a worker with the schedule, length of the assignment (if known), and the amount of sick leave to which temporary workers are entitled under the **law**. The firm must also provide the terms of use for sick leave.

In the event of a change in a schedule, shift or location of a multi-day assignment, the firm must provide written notice of the change not less than 48 hours in advance to the worker (when possible).

When a worker is assigned to the same assignment for more than one day, the firm must provide the employment notice on the first day of the assignment, and on each day that a term found on the employment notice changes.

Note: If notice is not provided, the firm should be prepared to demonstrate that it was not possible to provide the required notice.

Seeking Work:

If the worker is not placed with a third-party client or contracted to work for that day, the firm must, upon request, provide a worker with a confirmation that:

- Is signed by an employee of the firm;
- States the temporary worker sought work; and
- Includes the firm's name, the worker's name and address, and the date and the time the worker receives the confirmation.

Additional Protections:

Under the law, firms:

- Are prohibited from sending a worker to a placement where a strike, lockout or other labor dispute exists without providing, at the time of dispatch, a written statement that informs the worker of the labor dispute and the worker's right to refuse the assignment.
- Must make translation services from their company or a vendor available to temporary workers. The translators must be able to effectively communicate information in Spanish (or any other language that is generally understood in the locale of the firm), as required under the law.

Recordkeeping:

The law includes extensive recordkeeping requirements for employers, such as when firms send one or more individuals as temporary workers. The firm must maintain all records for a period of six years.

See the **text of the law** for detailed recordkeeping requirements.

Non-retaliation:

Firms are prohibited from retaliating against workers that exercise their rights **under the law**.

Note: Firing or disciplining a worker within 90 days of a worker exercising their rights under the law will increase the assumption that retaliation has occurred.

Next Steps:

New Jersey staffing firms should:

- Stay apprised of the new protections granted under Assembly Bill 1474.
- Be on the lookout for a multilingual outreach program from the state to inform workers of their rights.
- Consult legal counsel with inquiries on the applications of the law.

State of New York Expands Nondiscrimination Protections

New York has enacted legislation (Assembly Bill 6328) that prohibits employers from discriminating against employees on the basis of citizenship or immigration status. Assembly Bill 6328 is effective immediately.

The Details:

New York State's Human Rights Law (NYSHRL) prohibits employers with four or more employees from discriminating against individuals based on race, creed and national origin, among other characteristics. New York State and New York City had also previously enacted legislation and guidance expanding immigrant protections.

Assembly Bill 6328:

Effective immediately, covered employers are now also prohibited from discriminating against individuals on the basis of the following:

- The citizenship of any person; or
- The immigration status of any person who is not a citizen of the United States.

Next Steps:

New York State employers should review their policies and practices to ensure compliance with the expanded protections under the law.

State of New York Updates Salary Transparency Requirements

New York has enacted legislation **(Assembly Bill 999)** that amends employer salary transparency requirements. The originally enacted September 17, 2023 effective date remains unchanged by the amendment.

The Details:

New York previously enacted legislation (**Senate Bill 9427A**), which requires employers with four or more employees to disclose compensation or the range of compensation to applicants and employees, starting September 17, 2023.

On March 3, 2023, New York enacted an amendment (Assembly Bill 999) which modifies the applicability of the law, clarifies what constitutes an "advertisement" and lessens an employer's recordkeeping requirements.

Applicability of the Law:

Originally, the law applied its advertisement requirements to cover positions that "can or will be performed' in the state of New York." The amendment modifies the obligation to cover advertisements for positions that "will be physically performed, at least part" in New York, as well as those "that will physically be performed outside of New York, but report to a supervisor, office, or other worksite in New York."

In short, advertisements for the following positions will now be covered by the law as amended:

- Those that will be physically performed in New York, even if only in part. This could include, for example, hybrid remote workers that are required to periodically report in person in New York; and
- Those that will be physically performed outside of New York, but report to a supervisor, office or other worksite in New York.

Employers operating in other jurisdictions in New York with pay transparency laws may need to coordinate compliance with the state law and should consider consulting legal counsel to help determine which laws apply to their business. For example, the **New York City law** expressly excludes "positions that cannot or will not be performed, at least in part, in the city of New York."

Job Advertisements:

The law did not previously define job "advertisement." Assembly Bill 999 defines advertisement as making a written description of an employment opportunity available to a pool of potential applicants for internal or public viewing, including electronically.

Recordkeeping Requirements:

The law previously required employers to retain records of historical compensation ranges and job descriptions. Assembly Bill 999 removes this requirement. While no longer required, employers may want to retain such records to help explain previous compensation decisions, if needed.

Next Steps:

New York employers should:

- Review their hiring policies and procedures, and train managers and personnel involved in the recruitment process on the changes under Assembly Bill 999.
- Post salary ranges and other requirements on internal and external job postings.
- Although not required, consider retaining records of compensation ranges and job descriptions.

Virginia Prohibits Use of SSN on ID Cards

Virginia has enacted Senate Bill 1040 (SB 1040), which restricts the use of an employee's Social Security number (SSN) on an identification card or access badge.

The Details:

SB 1040, effective July 1, 2023, states in part as follows:

"No employer shall (i) use an employee's social security number or any derivative thereof as such employee's identification number or (ii) include an employee's social security number or any number derived thereof on any identification card or badge, any access card or badge, or any other similar card or badge issued to such employee."

Any employer who knowingly violates SB 1040 is subject to a civil penalty of $100 for each violation. However, the penalty may be decreased based on an appeal from the employer at the discretion of the Commissioner.

Next Steps:

Effective July 1, 2023, employers should cease using an employee's SSN or any part of the employee's SSN on any identification card or access badge issued to the employee.

Upcoming Minimum Wage Increases

Minimum Wage Announcements – 3/16/23 – 4/15/23

The following states or localities have announced new minimum wage increases.

State or Locality	Minimum Wage Rate	Minimum Tipped Cash Wage	Effective Date(s)	New or Updated Poster Requirement?	Notes
Pasadena, CA	$16.93	N/A*	7/1/23	Yes	
Nevada (health benefits offered)	$10.25	N/A*	7/1/23	Yes	
Nevada (no health benefits offered)	$11.25	N/A*	7/1/23	Yes	
West Hollywood, CA (all employers)	$19.08**	N/A*	7/1/23	Yes	
Fremont, CA	$16.80	N/A*	7/1/23	Yes	
Los Angeles County, CA	$16.90	N/A*	7/1/23	Yes	

*California and Nevada do not allow the use of a tip credit.

**Previously this was reported as $18.86, but West Hollywood, CA has since increased to $19.08.

Federal

IRS Releases Guidance on Reimbursement of Nutrition, Wellness and General Health Expenses

On March 17, 2023, the Internal Revenue Service (IRS) released frequently asked questions (FAQs) via IRS News Release IR-2023-47 regarding the reimbursement of nutrition, wellness, and general health expenses under health flexible spending accounts (Health FSAs), health savings accounts (HSAs) and health reimbursement arrangements (HRAs).

The Details:

Internal Revenue Code Section 213 defines medical care as amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting a structure or function of the body. The FAQs explain that medical expenses must be primarily to alleviate or prevent a physical or mental disability or illness, and do not include expenses that are merely beneficial to general health.

A sampling of the FAQs are as follows:

Q1: Is the cost of a dental exam a medical expense that can be paid or reimbursed by an HSA, FSA, Archer MSA, or HRA?

A1: Yes, because the dental exam provides a diagnosis of whether a disease or illness is present.

Q4: Is the cost of a program to treat a drug-related substance use disorder a medical expense that can be paid or reimbursed by an HSA, FSA, Archer MSA, or HRA?

A4: Yes, because the program treats a disease (substance use disorder).

Q9: Is the cost of a weight-loss program a medical expense that can be paid or reimbursed by an HSA, FSA, Archer MSA, or HRA?

A9: Yes, but only if the program treats a specific disease diagnosed by a physician (such as obesity, diabetes, hypertension or heart disease). Otherwise, the cost of a weight-loss program is not a medical expense.

Q10: Is the cost of a gym membership a medical expense that can be paid or reimbursed by an HSA, FSA, Archer MSA, or HRA?

A10: Yes, but only if the membership was purchased for the sole purpose of affecting a structure or function of the body (such as a prescribed plan for physical therapy to treat an injury) or the sole purpose of treating a specific disease diagnosed by a physician (such as obesity, hypertension or heart disease). Otherwise, the cost of a gym membership is for the general health of the individual and is not a medical expense.

Q11: Is the cost of exercise for the improvement of general health, such as swimming or dancing lessons, a medical expense that can be paid or reimbursed by an HSA, FSA, Archer MSA, or HRA?

A11: No, because the exercise, even if recommended by a doctor, is only for the improvement of general health.

Next Steps:

Employers should review the IRS guidance provided in the FAQs to verify that their plans, where applicable, are reimbursing only eligible expenses.

For a copy of all the FAQs, click on the link provided below.

https://www.irs.gov/individuals/frequently-asked-questions-about-medical-expenses-related-to-nutrition-wellness-and-general-health

How the End of the Public Health Emergency Impacts Employee Benefit Plans

Click **here** for the article.

Updated – NLRB Says Overly Broad Provisions in Severance Agreements Are Unlawful

The National Labor Relations Board (NLRB) has ruled that employers are barred from drafting severance agreements that contain overly broad non-disparagement and confidentiality prohibitions. After the ruling, the NLRB's general counsel **released guidance** indicating the decision also applies retroactively to agreements already entered with such provisions.

The Details:

The case before the NLRB (**McLaren Macomb**) involved an employer that permanently furloughed 11 employees and presented each of them with an agreement that offered severance pay if they signed it. All 11 employees signed the severance agreement.

The agreement required the furloughed employee to release the employer from any claims arising out of their employment or termination of employment. The agreement also contained the following provisions regarding confidentiality and disparagement:

> "The employee acknowledges that the terms of this agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> At all times hereafter, the employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the employee has or had knowledge of, or involvement with, by reason of the employee's employment. At all times hereafter, the employee agrees not to make statements to employer's employees or to the general public that could disparage or harm the image of employer, its parent and affiliated entities and their officers, directors, employees, agents, and representatives."

If the furloughed workers violated these provisions, they could have faced significant sanctions.

The NLRB found that the plain language of those provisions violated employees' rights under Section 7 of the National Labor Relations Act (NLRA). Under **Section 7 of the NLRA**, employees have the right to act together to improve wages and working conditions and to discuss wages, benefits, and other terms and conditions of employment, with or without a union.

> "The non-disparagement provision on its face substantially interferes with employees' Section 7 rights," the NLRB found. "Public statements by employees about the workplace are central to the exercise of employee rights under the NLRA. Yet the broad provision at issue here prohibits the employee from making any 'statements to employees or to the general public that could disparage or harm the image of the employer' — including, it would seem, any statement asserting that the employer had violated the NLRA (as by, for example, offering a settlement agreement with unlawful provisions)."

The NLRB also found that the confidentiality provision unlawfully impacted Section 7 rights.

> "The provision broadly prohibits the subject employee from disclosing the terms of the agreement 'to any third person,'" the NLRB said. "The employee is thus precluded from disclosing even the existence of an unlawful provision contained in the agreement. This proscription would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a NLRB investigation into the employer's use of the severance agreement, including the non-disparagement provision. Such a broad surrender of Section 7 rights contravenes established public policy that all persons with knowledge of unfair labor practices should be free from coercion in cooperating with the NLRB. The confidentiality provision has an impermissible chilling tendency on the Section 7 rights of all employees because it bars the subject employee from providing information to the NLRB concerning the employer's unlawful interference with other employees' statutory rights."

Importantly, the NLRB found that simply offering employees a severance agreement that includes unlawful provisions violates the NLRA, even if the employer doesn't take any additional adverse action against individuals (such as by imposing sanctions against a furloughed worker because they spoke with the NLRB about the severance agreement).

> "A severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful," the NLRB wrote. "In making that determination we will examine the language of the agreement, including whether any relinquishment of Section 7 rights is narrowly tailored."

Next Steps:

Review severance agreements to ensure that any provision that could impact Section 7 rights is narrowly tailored or removed. The NLRB didn't define what is considered narrowly tailored, so employers may want to consult legal counsel when conducting the review.

Updated Background Check Notice Required

The Consumer Financial Protection Bureau (CFPB) has published an updated version of "A Summary of Your Rights Under the Fair Credit Reporting Act," a notice required to be provided by employers during the background screening process.

The effective date of the new version of the summary notice is April 19, 2023, but the CFPB is allowing employers until March 20, 2024, to start using the new version.

The Details:

The updated version of the summary notice generally includes non-substantive changes, such as revised contact information for relevant government agencies. The English and Spanish versions of the updated notice can be found **here** and **here**.

By way of background, a copy of the summary notice must be provided to an applicant or employee before taking adverse employment action against that individual based on information in a background screening report. A copy of the report relied on to make the decision must also be provided at this time.

Many employers also provide the summary notice to an applicant or employee prior to conducting a background screening on that individual. However, it is required before the background check only if the employer is conducting an investigative background screening. In contrast to a standard background check, an investigative background check involves personal interviews concerning an individual's character, general reputation, personal characteristics and lifestyle.

Next Steps:

If you conduct background checks, make sure you use the updated notice as part of your pre-adverse action processes by no later than March 20, 2024.

ADP Compliance Resources

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration, and help ensure that ADP systems are updated as relevant laws evolve. For the latest on how federal and state tax law changes may impact your business, visit the ADP ***Eye on Washington*** Web page located at **www.adp.com/regulatorynews.**

If you have any questions regarding our services, please call 855-466-0790.

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Updated on April 21, 2023