

5 Payroll Challenges for Corporations in 2021

Introduction

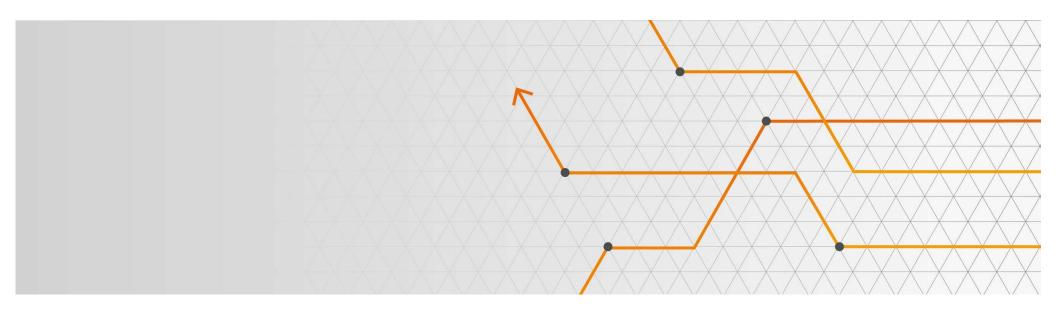
- A corporation's biggest expense is typically payroll.
- Payroll is interwoven throughout various areas in a corporation like the tax and human resources departments.
- Corporations must adhere to numerous payroll laws, rules, regulations, and guidance at the federal, state and local levels.
- COVID-19 relief for employers and workers means more laws, rules, regulations and guidance to keep up with.
- A corporation is ultimately the responsible party for any liability issues that may arise regarding payroll.
- An online payroll resource library can be an essential tool for corporations.



Agenda

In this webinar, we will discuss 5 payroll challenges for corporations in 2021 and some steps to take for working through these issues.

- 1. American Rescue Plan Act's Payroll Provisions
- 2. Tracking Regulatory Changes in the New Presidential Administration
- 3. Remote Working and Taxation
- 4. Worker Classification
- 5. Federal and State Unemployment Tax



1. American Rescue Plan Act's Payroll Provisions

- American Rescue Plan Act (ARPA) signed into law on March 11, 2021.
- Biggest provision to note for corporations is Employee Retention Credit (ERC) extension through 2021.
- Refundable tax credit originated from March 2020 Coronavirus Aid, Relief and Security (CARES) Act.
- Quick ERC math: Total potential credit in 2021 is up to \$7,000 per employee, per calendar quarter (\$28,000 potential total credit per employee in 2021) for eligible employers (full or partial suspension due to COVID-19-related shutdown or gross receipts are less than 80% for same calendar quarter in prior year).
- All employers are eligible for the ERC if certain criteria is met.
- More quick math: Full credit for all four quarters of 2021 for 100 employees is \$280,000. Full credit for all four quarters of 2021 for 400 employees is \$1,120,000.
- The challenge: determining qualifications, amount and how to get the credit.



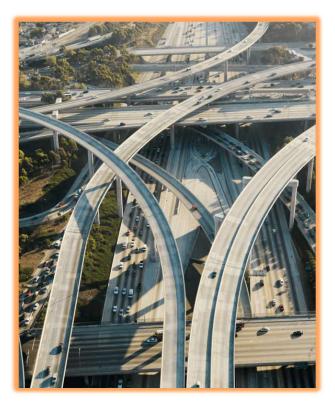
What to Know About the ERC

- Time periods covered by each Act:
 - *CARES Act* wages paid between March 12, 2020 through December 31, 2020.
 - CAA wages paid between January 1, 2021 through June 30, 2021.
 - *ARPA* -- wages paid between July 1, 2021 through December 31, 2021.
- Amount of credit:
 - CARES Act 50% of the qualified wages (up to \$10,000 total) paid to the employee, plus the cost to provide health benefits to the employee. Capped at \$5,000 for all qualified wages.
 - CAA The ERC amount increased to 70% of qualified wages (up to \$10,000 per quarter), which includes the cost to continue providing health benefits. Capped at \$7,000 per quarter (1st and 2nd quarters of 2021).
 - ARPA Retains 70% credit for qualified wages (up to \$10,000 per quarter) paid between July 1, 2021 and December 31, 2021, which includes the cost to provide health benefits. Capped at \$7,000 per quarter (3rd and 4th quarters of 2021).
- Eligibility requirements:
 - CARES Act For wages paid when business operations that are either fully or partially suspended by a COVID-19 lockdown order; or, for any quarter in 2020, if gross receipts are less than 50% of gross receipts for the same quarter in 2019.
 - CAA Effective January 1, 2021, for wages paid when business operations that are either fully or partially suspended by a COVID-19 lockdown order; or, for any quarter in 2021, if gross receipts are less than 80% of gross receipts compared to the same quarter in 2019.
 - ARPA Same as CAA but added election to use prior quarter's gross receipts for determining 80% gross receipts. Also allows a Recovery Startup Business (RSB) to claim credit.
- Credit eligibility whether or not an employee is working:
 - Key to note for corporations ERC available to employers of all sizes but only for wages paid to employees for not working. Threshold was 100 employees under CARES Act. Increased to more than 500 for CAA and ARPA. ARPA also adds Severely Financially Distressed Employer that qualifies regardless of number of employees.



Complexities of the ERC

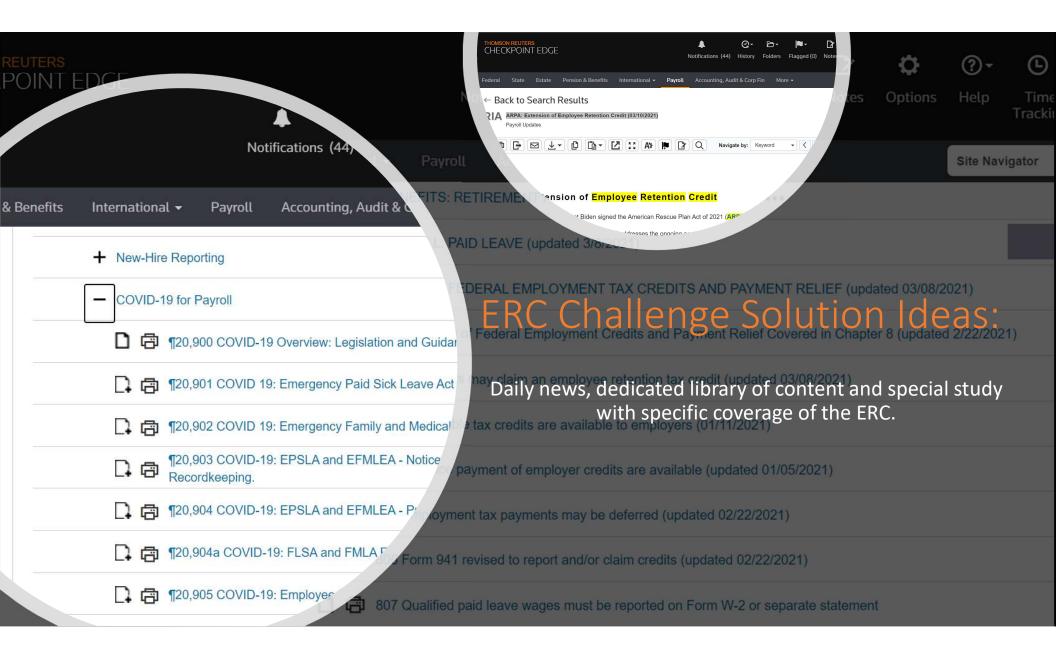
- The ERC has been extended and changed to one degree or another twice since it was signed into law as part of the CARES Act in 2020 and extended and expanded with the Consolidated Appropriations Act (CAA) and ARPA.
- The IRS issued guidance on the ERC, added and updated several forms, and maintains a list of continuously updated FAQs on the subject.
- There is much to consider and much to do to obtain this credit.



ERC Challenge Solution Ideas:

A free ERC tool for assistance in determining eligibility for the credit.

EMPLOYEE RETENTION CREDIT ELIGIBILITY TOOL	
Updated: April 6, 2021	
Welcome to the Employee Retention Credit Eligibility Tool. This tool may be used to determine if a business qualifies for the Employee Retention Credit.	
The guidance for the Employee Retention Credit can change at any time and the tool may not reflect the actual interpretation of the Internal Revenue Service.	
The Employee Retention Credit (ERC) is a refundable tax credit providing an incentive for employers to provide wages to workers during the COVID-19 public health emergency. Originally created by the CARES Act, the Taxpayer Certainty and Disaster Tax Relief	
Act of 2020 (TCDTR) contained in the Consolidated Appropriations Act, 2021, extended and expanded the ERC that was due to expire on Dec. 31, 2020 under the CARES Act. The American Rescue Plan Act (ARPA) of 2021 further extended and expanded this credit.	
Beginning Jan. 1, 2021, the ERC is a refundable tax credit against certain employment taxes equal to 70% (previously, 50%) of qualified wages (up to \$10,000 of qualified wages per employee for each quarter of 2021; previously, \$10,000 in 2020) that an eligible employer pays to employees after March 12, 2020, and before January 1, 2022. Employers of any size may be eligible. The credit may not be claimed for wages paid that the employer received a credit for paid sick leave or paid family leave under FFCRA.	
Note: This tool is for COVID-19 related ERC. There is also an ERC available to disaster-impacted employers that is unrelated to COVID-19.	
Previously, businesses that participated in the Paycheck Protection Program were generally prohibited from taking the ERC, however, the TCDTR retroactively repealed this provision.	
This tool should be used for informational and discussion purposes only.	
START	



What to Know About the ARPA COBRA Premium Subsidy

- ARPA establishes a 100% COBRA premium subsidy between April 1, 2021 to September 30, 2021
- The American Recovery and Reinvestment Act first introduced the idea of the COBRA premium subsidy during the Great Recession.
- Under ARPA, employers are required to provide COBRA coverage to employees who elect coverage and cover 100% of the premium.
- The COBRA premium subsidy provides a payroll tax credit where the federal government will reimburse 100% of the cost of continuing coverage.
- The credit is against the employer's share of Medicare tax and may be advanced.



ARPA COBRA Premium Subsidy Eligibility

Beginning April 1, 2021 and ending September 30, 2021, the COBRA Premium Subsidy must be offered to:

Assistance Eligible Individuals (AEIs) who are involuntarily terminated or are no longer eligible for health coverage due to a reduction of hours and elect COBRA within the subsidy period.

AEIs currently enrolled in COBRA.

Special Enrollment Period



AEIs who did not initially elect COBRA coverage but whose coverage period has not expired. Subsidy would be for remaining period up to September 30.

AEIs who initially elected COBRA coverage but allowed coverage to lapse.



ARPA COBRA Premium Subsidy Details

COBRA Premium Subsidy Coverage Period

Beginning April 1, 2021:

- The first month the individual is eligible for Medicare or coverage by another group health plan
- The end of the maximum COBRA coverage period (usually 18 months)
- September 30, 2021

Involuntary Termination

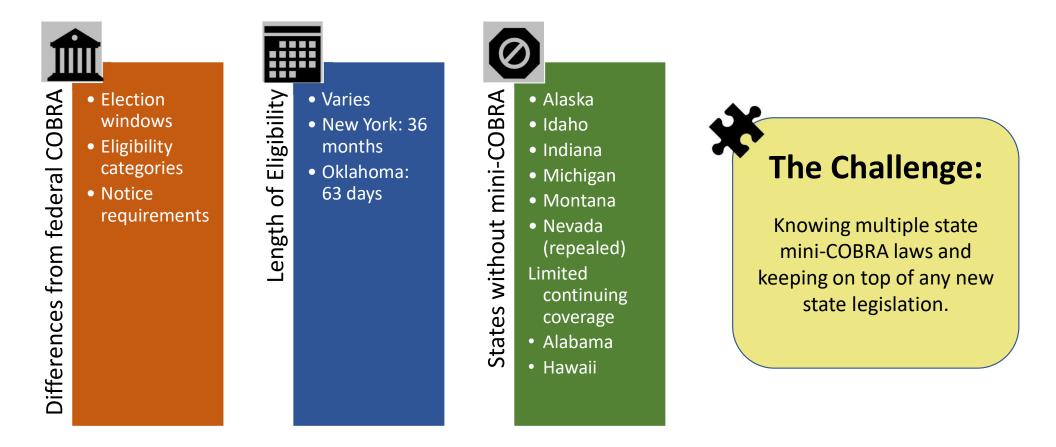
ARPA does not define this term.

Look for guidance in the future.

New Notice Requirements

New notice #1: Inform AEIs of the availability of the subsidy and option to enroll including different coverage (if permitted by the plan).
New notice #2: Inform AEIs who elected COBRA but discontinued coverage of extended election period before April 1 by May 30, 2021.
New notice #3: Inform AEIs that subsidy is due to expire. Between 45 to 15 days of expiration date.

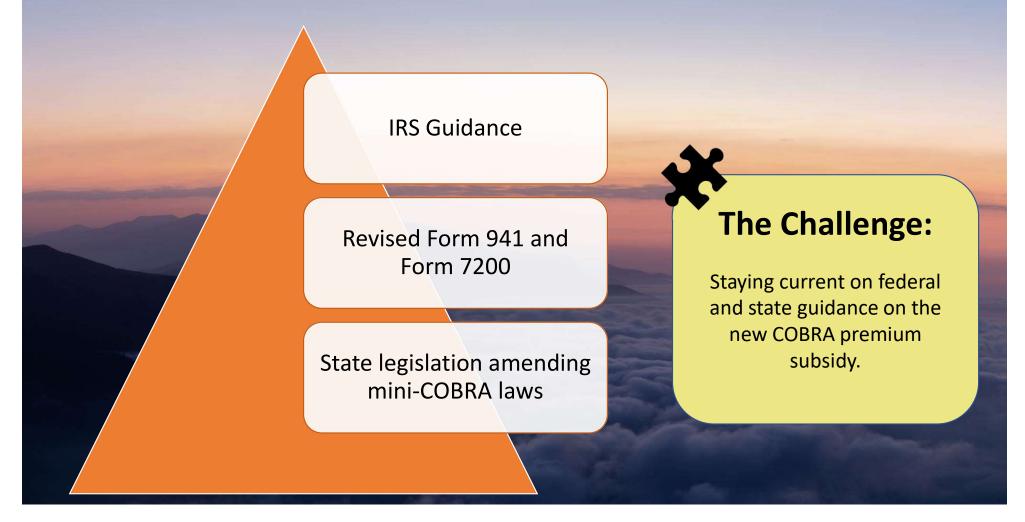
COBRA Premium Subsidy and State Mini-COBRA Laws

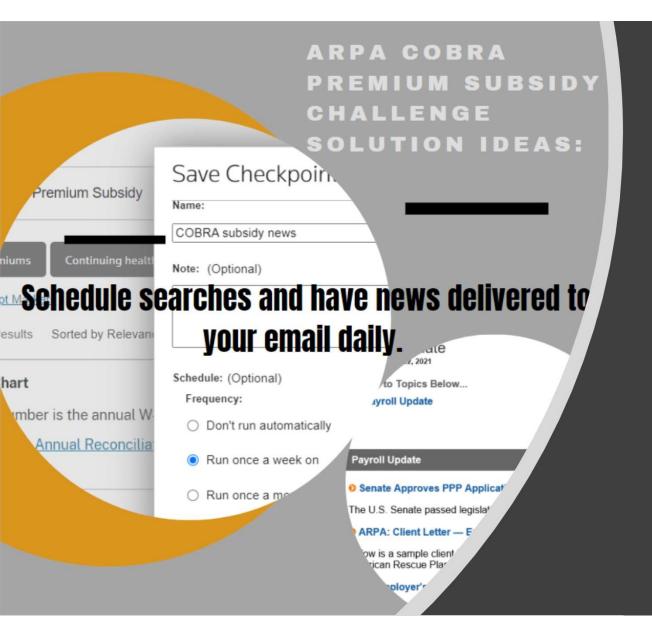


ARPA COBRA Premium Subsidy Challenge Solution Ideas: Dedicated COBRA and mini-COBRA coverage

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What's on the Horizon for the COBRA Premium Subsidy





ARPA COBRA Premium Subsidy Challenge Solution Ideas

2. Tracking Regulatory Changes in the New Presidential Administration

- On January 20, 2021, President Joe Biden issued a memorandum for a regulatory freeze pending review.
- Rules sent to the Federal Register but not published can not be published until a department head appointed or designated by the Biden Administration reviews and approves the rule.
- On January 26, 2021, the Department of Labor (DOL) suspended a final rule **on tipped employees** in the food service and hospitality industries that was previously announced on December 22, 2020.
- On March 16, 2021, the Department of Labor announced two notices of proposed rulemaking to rescind the prior administration's **joint employer** and **independent contractor** rules.
- **The challenge**: Knowing what regulations will change, how will they change, when they will change, and what it may mean to corporations?



Rule on Tipped Employees

- In December 2020, the DOL issued final regulations amending the tip credit provisions of the Fair Labor Standards Act (FLSA).
- The amendments codify existing Wage and Hour Division (WHD) guidance on dual jobs and the tip credit and implement FLSA tip credit amendments from the Consolidated Appropriations Act of 2018 (CAA, 2018).
- The CAA prohibits employers from keeping tips received by their employees, regardless of whether the employer takes a credit for tips earned by workers toward its minimum wage obligation to those employees under the FLSA
- The final rules align the regulations with prior DOL guidance on dual jobs and the tip credit.
- Also largely codifies the DOL's guidance regarding an employer's ability to claim the tip credit when workers perform both tipped and nontipped duties, clarifying when employers can continue to claim the tip credit while the employee performs duties that do not generate tips. The guidance clarifies which non-tipped duties are considered related to a tip-producing occupation.
- On January 20, 2021 Presidential Memorandum issued a regulatory freeze, which includes this rule.
- Rule had original effective date of March 1, 2021.
- Requested delay would make effective date April 30, 2021.
- Some provisions of the Final Rule will become effective, including the prohibition on employers – including managers and supervisors – keeping tips received by workers, regardless of whether the employer takes a tip credit.



Rule on Joint Employers

- Joint employer rule issued in January 2020 and took effect in March 2020.
- Rule established a four-factor test for deciding whether workers can hold two or more linked businesses liable for the same Fair Labor Standards Act (FLSA) violation.
- Rule emphasized control over workers, asserting joint employment hinges on common powers to hire and fire, supervise and schedule, determine compensation, and maintain employment records.
- Because joint employers are jointly and severally liable for FLSA claims, the rule provided franchisers and businesses that hire workers through staffing firms a shield from liability for many minimum wage and overtime pay claims based on alleged joint employment with those staffing firms.
- Rule was challenged in court and in September 2020 the court vacated part of the rule, holding that the rule is contrary to the FLSA and arbitrary and capricious..
- The DOL is currently proposing to rescind the joint employer rule completely.
- Employers who use staffing agencies should consider the risk of being held liable as joint employers for claims under the FLSA.



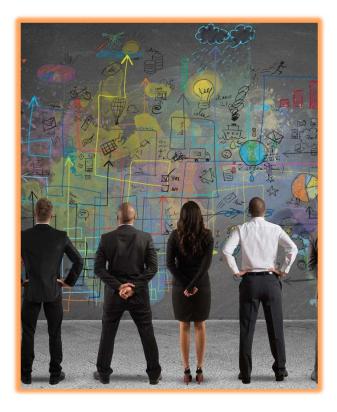
Rule on Independent Contractors

- On January 7, 2021, the DOL published a final rule regarding independent contractor status under the FLSA with an original effective date of March 8, 2021.
- The final rule reaffirms the "economic reality" test to determine whether an individual is an independent contractor or employee under the FLSA.
- Identifies two "core factors" (1. nature and degree or control over work and 2. worker's opportunity for profit of loss) that are most probative to the question of whether a worker is economically dependent on someone else's business or is in business for him or herself.
- Identifies three other factors as additional guidance, particularly when the two core factors do not point to the same classification (1. the amount of skill required for the work, 2. the degree of permanence of the working relationship between the worker and the potential employer and 3. whether the work is part of an integrated unit of production).
- On January 20, 2021 Presidential Memorandum issued a regulatory freeze, which includes this rule.
- On March 4, 2021, DOL announced delay in rule effective date until May 7, 2021.
- On March 11, 2021, DOL announced proposal to rescind the rule altogether (comment period ended April 12, 2021).
- Businesses should use caution when classifying workers as independent contractors or employees and be mindful of potential liability under the FLSA for workers who are deemed employees.



Complexities of Regulatory Changes

- **Tipped employee rule** Service industry corporations may have planned for rule and effective date. Regulatory freeze delaying effective date. What will the rule look like when it is eventually finalized? How will it be different from the original rule. How can corporations prepare?
- Joint employer rule if the rule is rescinded completely, what will that look like for corporations? Will the DOL rescind and replace this rule and what would that rule look like? If rescinded, employers who use staffing agencies should be cautious about being held liable as a joint employer. Also, if rescinded, will a new rule be issued and what will it look like?
- Independent contractor rule This rule has been delayed until May 7, 2021 but also the DOL has moved to rescind it altogether. What is going to happen? Corporations should exercise caution as worker misclassifications can be costly. How to know what compliance will look like? Also, if rescinded, will the DOL create a new independent contractor rule? Will it be stricter?
- **Other changes** What other regulatory changes are coming? How will they affect a corporation?



Solution ideas for keeping up with regulatory changes:



- Access to a daily news feed dedicated to payroll industry news that keeps up to date with regulatory changes.
- A searchable payroll library powered by A.I. with in depth coverage of such rules that includes source information for further reference.

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DOL Finalizes Effective Date Delay of		
<u>Independent Contractor Rule Until May</u> 7 (03/04/2021)		

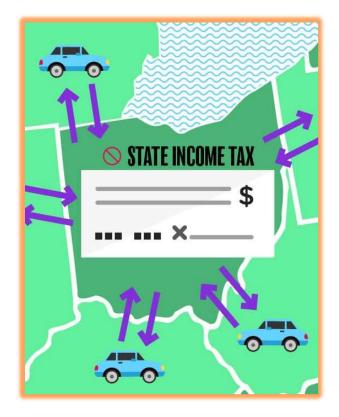
3. Remote Working and Taxation

- COVID-19 changed the way many employees report for work.
- Remote working has been helpful to companies by allowing their workers to carry on with tasks from home.
- Most states tax an employee based on where the employee performs services.
- Many employees now perform services in another state from where their original work state location was.
- **The challenge**: How to withhold taxes for employees who work remotely from a different state than the company's work location? Is there guidance? Is there relief? Are there consequences?



Nexus and Reciprocal Agreements

- **Nexus** In order for a state to have the power to require an employer to withholding income tax from an employee, the employer must have a "nexus" connection with the requiring state.
 - The presence of a business location like an office, store or factory in the state will create nexus.
 - Also, the entry of an employee into the state to make a sale or perform a service call.
 - And sometimes, an employee working remotely from his/her resident state on an occasional basis may be enough of a presence to create nexus.
 - Many states have issued guidance waiving nexus during the COVID-19 pandemic. Most state guidance says nexus may be established if the remote work continues past the health emergency period.
- **Reciprocity** Some states have entered into reciprocal agreements which allows the employer to withhold only for the state of residence. Meaning the employee is only taxed by the employer for the state where they live and not where they work.
- **Convenience of employer rule in some states** income tax is imposed on nonresidents who perform their services outside of the state for their own convenience, rather than the convenience of the employer.



State Guidance for Nexus During COVID-19

- Several states have issued COVID-19 guidance for help in determining from which state employers should withhold income taxes during the health emergency.
- Such states include: Alabama, California, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont and Wisconsin.
- Note: This guidance varies from state-to-state on the withholding taxation of remote workers from a different state during COVID-19.



Solution ideas for keeping up with state nexus rules during COVID-19:

- A detailed payroll resource that is searchable and powered by A.I.
- A dedicated COVID-19 resource to understand all of the state changes.
- The ability to create-a-chart for a quick reference to determine the rules for each state, if any.

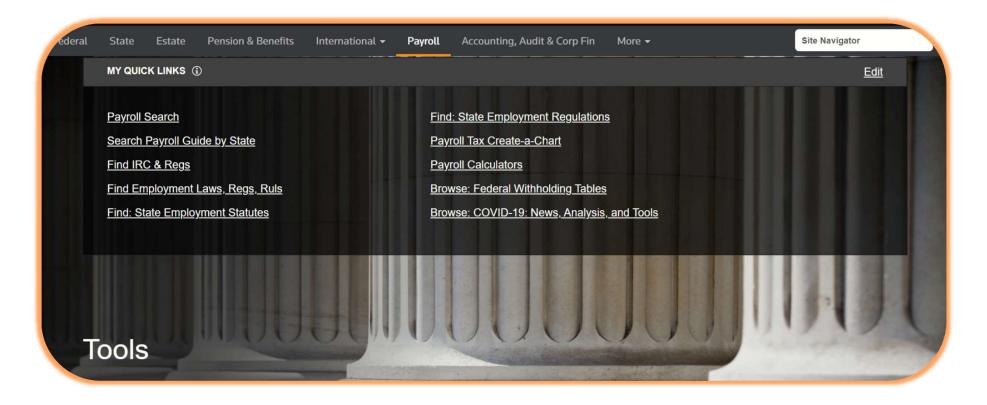
Resident/Nonresident Taxation -- Convenience of the Employer Rule

Does the state have a convenience of the employer rule under which income tax is imposed on nonresidents who perform their services outside of the state for their own convenience, rather than the convenience of the employer?

Taxing Authority	State has convenience of the employer rule?	Comments/Citations	Payroll Guide Paragraph
Federal	N/A	N/A	N/A
AK	N/A	The state does not have an income tax.	¶5301
AL	No	N/A	¶5202
AR	No	N/A	¶5502

Payroll Tax Chart R	esults	EXPAND ALL COLLAPSE ALL	
Legend: N/A - Not Applicable Display Charts:	ombined View - Charts on Top O Combined View - Jurisdictions on Top	 COVID-19 Paid leave — State/local policy on paid leave during COVID-19 Unemployment - Extension for filing/payment and/or penalty/interest waiver Wage Payment - State tax levies, garnishments, and child support 	 + □ Unemployment Tax + □ Wage Hour + □ Wage Payment
Withholding Tax - Telewor Has the state or locality issu	king led guidance regarding teleworking employees and nexus with the state?	 Withholding Tax - Filing and/or payment extensions Withholding Tax - Teleworking 	
Taxing Authority	Chart Answer	+ □ Federal and State Withholding	
Federal	N/A		
AK	No state income tax.	+ 🗌 Garnishment	
AL	The Alabama Department of Revenue (ADOR) has updated its ADOR Operation Updates	+ 🗆 New Hire Reporting	

COVID-19 Teleworking Create-A-Chart Example:



4. Worker Classification

- Worker classification is important because it determines if an employer must withhold and pay employment taxes, state and even local taxes.
- Typically, an employer does not have to withhold or pay taxes on payments to independent contractors.
- IRS general rule: an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not *what* will be done and *how* it will be done.
- However, there are more factors to consider from other agencies like the Department of Labor.
- Also, some states have their own rules for worker classification.
- Misclassifying workers can be very costly to corporations.
- **The challenge**: Keeping in compliance with federal and state rules for worker classification. The employer is ultimately the responsible party for potentially costly liability.



Federal Worker Classification Guidance

- Employee v. independent contractor an ongoing question.
- Generally, behavioral control, financial control and relationship of the parties determine worker classification.
- IRS Publication 15-A
- IRS offers help with classification: Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.
- DOL guidance Fact Sheet #13 (Am I an employee?), Fair Labor Standards Act.
- U.S. Supreme Court's seven significant factors.
- Consequences of misclassifying employees: payroll taxes, FLSA, Form I-9, benefits, etc.
- Section 530 of Revenue Act of 1978 provides employers with relief from federal employment tax obligations if there is: (1) reporting consistency, (2) substantive consistency and (3) reasonable basis.



States and worker classification

- States have differing worker classification rules to follow.
- Typically follows two test types: ABC or Common Law.
- Unemployment important for worker classification.
- Some states focused on app-based driver companies for worker classification.



The Rise of the Gig Worker

- Gig workers are independent contractors, online platform workers, contract firm workers, on-call workers, and temporary workers.
- More than 1/3 U.S. workers participate in the gig economy. Trend is that this percentage will continue to increase.
- May be more prevalent in corporations using a hybrid or agile workforce model where there's more spend on independent contractors for project work.
- Risk factor for hiring gig workers: are they employees or independent contractors?
- Worker classification is not based on what the worker prefers or what may seem to fit. It is a legal determination.



Solution ideas for worker classification:

- Between federal and state rules, regulations, laws and guidance, having a dedicated resource library with a search engine can help to come up with quick answers to important questions. Example: California worker classification has several exemption carve outs. How can you quickly find out what they are?
- Having an easily created chart that will run through the tests each state uses to determine worker classification. Helpful for corporations with multi-state locations.

Payroll Explanation and Analysis (RIA)
Group, LLC, Cal. Ct. App., 4th Dist., Div. 1, Dkt No. D072521, 10/23/18].
Click here to view the California Court of Appeals ruling.
App-based drivers exempt from ABC test. On November 3, 2020, voters approved a ballot item that classifies app-
based drivers (i.e., Lyft and Uber) as independent contractors. Proposition 22 overrides L. 2019, A5 and
exempts app-based driver companies from using the ABC test to classify workers.

Tools	Payroll Tax Chart	
Affordable Care Act Tools	1 Select Charts	
BEPS Global Currents	Please choose your desired charts:	NEXT
Calculators	Find Charts	
Checkpoint World		
Cost Basis Plus	EXPAND ALL COLLAPSE ALL	
Create-a-Chart		
State	+ 🗆 COVID-19	+ 🗌 Unemployment Tax
E-Filing	+ Federal and State Withholding	+ 🗌 Wage Hour
BNA State Tax Survey	+ Garnishment	+ 🗌 Wage Payment
Payroll Tax	+ New Hire Reporting	
IS Tax Treaties		

5. Federal and State Unemployment Tax

- Employers pay both federal and state unemployment tax (FUTA and SUTA).
- Corporations may have multi-state locations.
- Unemployment tax rates imposed on employers typically correspond to the levels of unemployment.
- During the Great Recession, more than 20 states were FUTA credit reduction states meaning employers paid more tax.
- During COVID-19, very high unemployment numbers. States increasing unemployment tax rates.
- Federal and state legislation aimed at helping employers.
- Nearly 20 states again have outstanding federal unemployment loans.
- If not repaid in 2022, several states may again become FUTA credit reduction states.
- Will the federal and state governments offer more help to employers to avoid such increases if due to COVID-19?
- **The challenge:** Keeping up with federal and state unemployment tax information and adjustments.



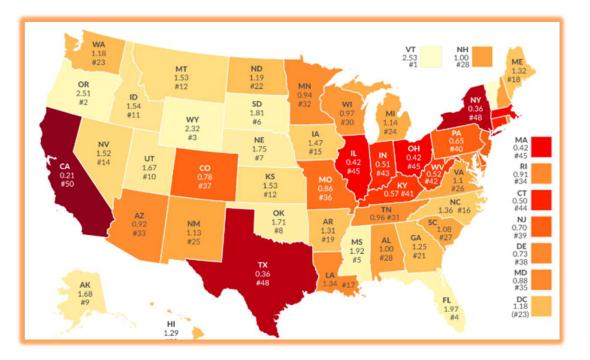
Federal Unemployment Tax (FUTA) Act

- FUTA imposes a federal employer tax used to help fund state workforce agencies.
- Tax rate is 6.0% on first \$7,000 in wages each year (maximum of \$42 per employee).
- FUTA credit is 5.4% (net rate 0.6%).
- FUTA credit reduction occurs when state takes federal unemployment loans (Title XII) to fund unemployment trust fund and the loan is not repaid within two years.
- 0.3% reduction for each year loan remains unpaid.
- Other add-on taxes may occur (e.g., BCR add-on and).
- This can add up for corporations. During Great Recession, California FUTA rate eventually reduced by 2.1% until loan was repaid (up to \$147 more per employee). If a corporation has hundreds or thousands of employees, that will add up.
- Currently, more than 20 states have outstanding federal unemployment loans. In 2022, could mean several states end up with a credit reduction.
- Will the federal government act with legislation since much of the unemployment contributing to the need for federal unemployment loans is due to COVID-19 as 2022 gets closer?



State Unemployment Tax Act (SUTA)

- Employers pay state unemployment taxes for locations within each state.
- State law determines these tax rates.
- SUTA taxes paid to state workforce agencies are used solely for the payment of benefits to eligible unemployed workers.
- Typically, the more unemployed workers, the higher the tax rate.
- COVID-19 resulted in very high unemployment rates.
- Some states took action to reduce the burden on employers (e.g., noncharging of benefits).
- Some states are taking further legislative action to stop or mitigate scheduled unemployment tax rate increases.
- What other legislative changes may take place? How can corporations stay on top of these changes, especially if the corporation have mulit-state locations?



Solution ideas for keeping up with FUTA and SUTA:

- Having a daily news source dedicated to providing updates and developments for federal and state unemployment taxes.
- Securing a payroll resource library that goes into significant details on the topics of federal and unemployment taxes with source material.
- Having access to numerous charts relating to the subject of unemployment for rapid access to various state information on the topic.

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Thank you for attending!

We thank you for your time and look forward to seeing you at another **Thomson Reuters** webinar soon!

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