HIRE Act Provides Employers with Tax Incentives for Hiring and Retaining Qualified Employees

April 12, 2010 by Kelley Kaufman

On March 18, 2010, President Barack Obama signed into law the Hiring Incentives to Restore Employment ("HIRE") Act (H.R. 2847). The HIRE Act amends the Internal Revenue Code ("IRC") to provide certain tax incentives for employers to hire unemployed workers. Specifically, the HIRE Act creates two new tax benefits for eligible employers: a payroll tax exemption for certain new hires, and a tax credit for retaining the qualified new hires.

First, the HIRE Act provides eligible employers with a payroll tax exemption for qualified employees hired between February 3, 2010, and January 11, 2011. This tax benefit is an exemption from having to pay the employer's 6.2% share of social security tax on the wages paid to the qualified employee from March 19, 2010, through December 31, 2010. Employers may claim this tax exemption on their quarterly tax returns, starting with the second quarter of 2010.

Second, the HIRE Act also provides eligible employers with a business tax credit for each qualified employee that is retained for at least one year, or 52 consecutive weeks. The employer may claim a credit of up to 6.2% of the wages paid to the retained employee over the one-year period, or a maximum of $1,000 per qualified employee, on its 2011 tax return.

Who Qualifies for the Tax Incentives?

Eligible employers include businesses, agricultural employers, tax-exempt organizations, tribal governments, and public colleges and universities who hire and retain qualified employees. Those employers that do not qualify for the tax incentives include federal, state and local government employers, as well as household employers.

In order to count as a qualified employee under the HIRE Act, the employee:

- Must begin his or her employment with an eligible employer after February 3, 2010, and before January 11, 2011;
- Must sign an affidavit, certifying under penalties of perjury that he or she either was unemployed during the 60 days prior to the start of the employment or had worked fewer than 40 hours total during the 60-day period;
- Cannot be a family member of or related to the employer; and
- Cannot be hired to replace an existing worker, unless that worker terminated his or her employment voluntarily, or was terminated for cause.

Employers also should be aware that this payroll tax exemption also applies to re-hired employees, so long as they meet the foregoing qualifications.

The HIRE Act provides that employers who are eligible for the payroll tax exemption also may be eligible for the retention tax credit. The retention tax credit is a general business credit, which employers may claim for each new hire retained for at least one year. Under the HIRE Act, a retained employee is a qualified employee (as defined above) who the employer employed during the taxable year and for a period of 52 consecutive weeks or more. The retained worker's wages during the last 26 weeks of the employment period must equal at least 80 percent of his or her wages during the first 26 weeks of that period.

Claiming the Tax Incentives

Employers seeking to take advantage of the HIRE Act's tax benefits must determine whether they are an eligible employer and whether any employees hired after February 3, 2010, are qualified employees as defined above. In addition, an employer that is seeking to maximize its benefits under the HIRE Act's provisions must factor in several considerations. First, as with any employment-related decisions, employers must take care to act in accordance with federal and state anti-discrimination laws. Further, employers should be aware that the Work Opportunity Tax Credit ("WOTC") cannot be claimed in addition to the payroll tax exemption. Thus, an employer must consider which tax incentive maximizes its benefit. If an employer wishes to obtain the WOTC with respect to a qualified employee, it may opt out of the payroll tax exemption for that employee's wages.

Employers who hire qualified employees between February 3, 2010, and January 11, 2011, also must obtain signed affidavit from each qualified employee, as discussed above. The Internal Revenue Service ("IRS") has released a W-11 affidavit form, which employers can download and use to meet this requirement. Employers who have hired qualified employees since February 3, 2010, should obtain a signed affidavit from their qualified new hires as soon as possible, preferably at the time of hire. This form must be completed and retained with the new hire's general personnel files; it need not be filed with the IRS.

In order to receive the tax benefit for qualified new hires, employers must claim the exemption on their quarterly federal tax returns, beginning with the second quarter of 2010. The exemption applies to wages paid to qualified employees from March 19, 2010, through December 31, 2010. Employers must claim the retention tax credit on their 2011 tax returns.

The IRS has posted information for employers regarding the HIRE Act's tax incentives on its website, including several pages of answers to Frequently Asked Questions regarding the HIRE Act. In addition, the IRS has posted both the W-11 affidavit form and a draft form 941, the Employer's Quarterly Federal Tax Return, which employers can use to claim the payroll tax exemption for eligible new hires.