

Recently Enacted HIRE Act Extends Two New Tax Credits to Employers

On March 18, 2010, President Barack H. Obama signed the federal Hiring Incentives to Restore Employment Act (HIRE Act) into law, which adds two new tax benefits for employers as an incentive to employ laid-off workers. All employers, except certain governmental employers, may be eligible for these tax benefits. State universities and colleges are eligible for the benefits even though they are government employers.

FICA (Employer OASDI Portion Only) Payroll Holiday

The first tax benefit permits an employer to forego paying the Social Security Old-Age, Survivors, and Disability Insurance (OASDI) portion of its Federal Insurance Contributions Act (FICA) tax obligation (6.2 percent on wages up to the \$106,800-compensation cap for 2010) on wages paid to certain qualified employees. The FICA tax holiday does not apply to (1) the employer's obligation to pay the Medicare Hospital Insurance (HI) portion of FICA taxes, (2) the employee's obligation to pay FICA taxes, or (3) taxpayers employing household help.

The FICA payroll holiday applies to wages paid from March 19, 2010 through December 31, 2010 to a qualified employee. A qualified employee is an employee who:

- Is employed by the employer after February 3, 2010 and prior to January 1, 2011
- Signs an affidavit, under penalty of perjury, that he or she has not been employed for more than 40 hours during the 60-day period ending on the date the individual begins employment with the employer
- Is not hired to replace another employee unless that other employee was terminated for cause (see below) or quit voluntarily
- Is not related to the employer in one of the following ways: son, daughter, or descendant of either; stepson or stepdaughter; brother, sister, stepbrother, stepsister; father, mother, or ancestor of either; stepfather or stepmother; niece or nephew; aunt or uncle; or the following in-laws: son, daughter, father, mother, brother, or sister

The Joint Committee on Taxation Technical Explanation report accompanying the bill provides that the term "for cause" includes a termination for lack of work such as when a plant is closed due to lack of demand for product.

For the first quarter of 2010, the employer must continue to pay its total FICA tax obligation, but can then claim a credit during the second quarter of 2010 for the first quarter OASDI taxes subject to the payroll holiday.

An employer who takes advantage of the payroll tax holiday for a qualified employee is not eligible to claim the work opportunity credit for that qualified employee. The Work Opportunity Tax Credit (WOTC) is a tax credit available to employers who hire employees included in one or more targeted groups such as veterans, ex-felons, and summer youth employees. The WOTC may be more valuable, especially for low-wage employees and employees hired later in 2010. However, the WOTC may be harder to qualify for because it is available only for certain types of employees, and a state agency must certify that the employee is part of one of the targeted groups.

The IRS is developing a form affidavit and will provide other information about the payroll holiday in the next few weeks.

\$1,000 Business Credit for Retained Workers

If an employer retains a qualified employee in employment for 52 consecutive weeks, then the employer may be able to claim the Retained Worker Tax Credit (RWTC), which is equal to the lesser of \$1,000 or 6.2 percent of such employee's wages for the 52-week period. Thus, for any qualified employee whose wages for such period are at least \$16,130, the \$1,000 tax credit will apply.

The RWTC may be claimed for any tax year that ends after the date of enactment, but because of the 52-week employment requirement, the credit will not be able to be claimed for at least one full year (i.e., the credit can first be claimed with respect to the 2011 tax year for calendar-year taxpayers).

In order to claim the credit, the wages paid to the qualified employee during the last 26 weeks of the 52-week employment period must equal at least 80 percent of such wages for the first 26 weeks of the period.

Presumably, an employer that decides to opt out of the payroll tax holiday in order to take advantage of the WOTC is eligible for the retained worker credit.

The RWTC is otherwise subject to all of the requirements of Internal Revenue Code Section 38 applicable to business tax credits, except that any unused RWTC may not be carried back to any tax year beginning before March 18, 2010.

Employer Actions

To take advantage of these tax benefits, employers should identify all current employees who may meet the requirements of a qualified employee and ask each such employee to sign the affidavit described above. Additionally, employers should ask each newly hired employee through the end of the year to sign an affidavit as well. Employers also should coordinate with their payroll vendors or payroll departments to discuss adjusting their payroll systems to reflect the OASDI payroll tax holiday and to take a credit for the first quarter OASDI taxes that are paid but that would otherwise be subject to the holiday rules.

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