

EMPLOYMENT LAW ALERT

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Hiring for the HIRE Act: Federal Legislation Offers Substantial Incentives for Bringing on New Workers

President Obama signed the Hiring Incentives to Restore Employment (HIRE) Act into law March 18, 2010, with hopes of incentivizing employers to hire workers who have been affected by sprawling rates of unemployment across the country. Put simply: the HIRE Act seeks to benefit employers who hire. As the economic outlook begins to rebound, employers should take some time to closely review this incentive-laden Act to see how it can benefit their bottom line.

Exemption from FICA Tax

The Act exempts businesses from the 6.2% FICA tax for each qualified employee hired between February 3 and December 31, 2010. The new employee must have been unemployed, or employed for no more than 40 hours, during the 60 days prior to hiring. Employers must require new eligible employees to sign an affidavit under penalties of perjury to this effect. In addition, to qualify for the exemption from FICA tax, the hired employee must not be taking another employee's position in the business, unless the replaced employee voluntarily resigned or was terminated for cause. This provision promotes expansion of the workforce rather than mere turnover. Finally, qualified employees cannot be related to either the employer or, if the employer is a corporation or other entity, a shareholder or owner who owns more than a 50 percent interest in the business and its profits. A "related party" for purposes of this Act includes a child or descendent, sibling or step-sibling, parent or step-parent, niece or nephew, aunt or uncle, or in-laws.

Depending on the new employee's salary, employers could save more than \$6,000 in FICA taxes per new employee.

Business Credit

In addition to the exemption from FICA tax, an employer will receive a business tax credit of \$1,000 for each qualified employee it retains. In order to be considered a "retained employee," the employee must be hired between February 3 and December 31, 2010, and must be employed for 52 consecutive weeks. In addition, the employee's wages for the last 26 weeks of employment must be at least 80 percent of the wages paid during the first 26 weeks of employment. This business credit may be carried forward beginning with the 2010 taxable year.

Other Tax Benefits

The HIRE Act also increases the deductibility of property purchased for and used in a trade or business from \$125,000 to \$250,000. This incentive allows businesses to write off up to \$250,000 in equipment or other goods used in furtherance of their business in the year of purchase, instead of depreciating the property over many years. The Act also expands many employer tax credits that were set to expire in 2009, including the wage credit for employees on active duty in the military and enhanced charitable deductions for corporate contributions. In addition, the Act extends unemployment insurance and the 65 percent COBRA premium subsidy for terminated workers through May 2010.

While the HIRE Act may not lead to immediate recovery, it certainly can be used by businesses in all stages of development. With only a limited window of time available, employers should consider how to take advantage of the Act's many tax incentives.

Important New Development Affecting FICA Taxation of Severance Benefits

Employers who paid FICA taxes on severance benefits provided to employees who were terminated due to a reduction in force, the closing of a plant or operation, or other similar circumstances, may have a claim for refund of such taxes. In a surprising new twist, a district court in Michigan concluded in *Quality Stores, Inc. v. United States* (W.D. Mich. February 23, 2010), that severance benefits paid in these limited circumstances do not constitute wages for FICA tax purposes.

This district court's conclusion runs contrary to earlier Internal Revenue Service rulings. Also, other courts that have addressed this issue have reached different conclusions. The IRS is certain to appeal this decision and the outcome could be overturned on appeal. Affected employers should consult their tax advisors to determine whether to file a protective claim for refund using the IRS Form 843. The time for filing refund claims for FICA taxes paid on severance benefits during 2006 will close on April 15, 2010.

Our tax attorneys have experience with these matters and can assist with filing a protective refund claim. We also can assist in evaluating whether to file a claim for refund of the employee portion of such taxes, in which case employee consents or refunds of the FICA tax would be required, and how to handle FICA taxes on severance benefits paid in the future.