

American Payroll Association

HIRE Act Takes Effect

No Employer Social Security Tax on Previously Unemployed New Hires in 2010

On March 18, President Obama signed the Hiring Incentives to Restore Employment (HIRE) Act (Pub. L. No. 111-147), one day after it received final approval by the U.S. Senate. The HIRE Act creates:

- a limited social security tax “holiday” for the employer share of social security tax on wages paid to a previously unemployed new hire, and
- a separate business tax credit of up to \$1,000 if the employee is employed for at least 52 weeks.

The aim of the Act is to free up funds for employers to hire individuals who have been out of work to further stimulate the recovering economy.

△ **GUIDANCE FROM THE IRS** – The IRS has issued a set of frequently asked questions and answers, which are available at www.irs.gov/businesses/small/article/0,,id=220745,00.html?portlet=7. The APA, along with representatives of the service provider community, has been working with the IRS to make HIRE Act implementation as smooth as possible for employers. For an article on APA’s efforts on the HIRE Act, see “Inside Washington” for April.

Social security tax ‘holiday’

The Act provides relief from the employer share of social security tax, which is 6.2% of covered wages up to \$106,800, on wages paid by a “qualified employer” to a “qualified individual” from March 19 (the day after the Act was enacted) through December 31, 2010. Wages paid to a qualified individual on or before March 19 or after

December 31, 2010, do not qualify for the social security tax relief. Wages earned by a qualified individual before March 19 but paid on or after March 19 do qualify for the social security tax relief.

The relief from the employer share of social security tax applies to services performed in a trade or business of a qualified employer or for a nonprofit entity. The social security tax relief does not apply to services performed by household employees because such employees are not working in the employer's trade or business.

Qualified employer defined. A qualified employer is broadly defined as any employer other than the United States, a state or local government, or any government instrumentality. However, public institutions of higher education can be qualified employers.

Qualified individual defined. A qualified individual is any individual who:

- begins employment with a qualified employer after February 3, 2010, and before January 1, 2011,
- certifies in a signed affidavit (i.e., statement), under penalties of perjury, that the individual has not been employed for more than 40 hours during the 60-day period ending on the day the individual begins work for the qualified employer,
- is not employed by the qualified employer to replace another employee unless the other employee left employment voluntarily or was terminated for cause, and
- is not related to the qualified employer or to anyone owning 50% or more of the stock or other capital of the employer.

Model affidavit – new Form W-11

The IRS has developed Form W-11, *Hiring Incentives to Restore Employment*

(HIRE) Act Employee Affidavit, for employers to use in having qualified individuals certify that they have not been employed for more than 40 hours during the 60-day period ending on the date the employee begins work for the employer claiming the social security tax relief. Employers do not have to use the form. They can use their own substitute form so long as it requires the employee to provide the same information as that requested on Form W-11 and to sign a perjury statement after all the information is provided.

Can minors sign affidavit? In conversations with the APA and other stakeholders, IRS personnel said that employers could rely on affidavits completed by employees under the age of 18 to the same extent they rely on Forms W-4 provided by such employees.

Electronic affidavit is OK. The IRS has indicated that an employer can institute an electronic Form W-11 process with an electronic signature if it follows processes similar to those required for electronic Forms W-4.

What about rehires?

While the Act doesn't specifically state whether it applies to employees who are rehired by the same employer, the IRS says that rehired employees would qualify if they meet the same qualifications as new hires.

'Terminated for cause' gets broad interpretation by IRS

The IRS will interpret the requirement that a qualified individual can replace an employee who was "terminated for cause" rather broadly to include reasons other than employee misconduct. This can include performance issues and other "facts and circumstances," as long as the employer did not terminate one employee in order to

claim the SS tax relief by hiring the same individual or another employee to fill that position.

Employers can ‘opt-out’

Qualified employers can elect to not have the social security tax “holiday” apply. The employer can make this election for each qualified individual, rather than having to make it for all qualified individuals at one time.

An employer may not receive the work opportunity tax credit (WOTC) on any wages paid to a qualified individual during the one-year period beginning when the individual was hired, unless the employer elects not to have the social security tax relief apply for such individual.

Employee share still must be withheld; no Medicare exemption

The social security tax “holiday” does not apply to the employee share of the tax, which still must be withheld and deposited by the employer. The “holiday” also does not apply to either the employer or employee share of Medicare tax.

Special rule for 1st quarter wages

In order to make implementation of the social security tax relief somewhat more feasible, the Act states that instead of immediately stopping payment of the employer share of social security tax on the day after the Act is signed into law (March 19), the employer will treat the employer’s social security tax on qualified individuals’ wages paid from March 19-31 as a payment against the employer share of social security tax due for the second quarter of 2010. The payment will be treated as being made on the first day of the second quarter – April 1.

Therefore, the employer must deposit the full employer share of social security

tax for wages paid in the first quarter and report it on Form 941, *Employer's Quarterly Federal Tax Return*, and then treat the amount that would have qualified for the social security tax reduction under the HIRE Act as a payment in the second quarter, which allows the employer to reduce its payroll tax payments for that quarter. This payment will be reflected on the revised Form 941 (see discussion following).

Tax deposits in the 2nd-4th quarters

As noted above, the employer may reduce its payroll tax deposits for the second quarter by the amount of the employer share of social security tax that would have qualified for HIRE Act relief for wages paid from March 19-31. For wages paid from April 1 – December 31, 2010 that qualify for HIRE Act social security tax relief, the employer's payroll tax liability is reduced, so it will not deposit the employer share of social security tax on wages paid to qualified individuals up to the social security wage base. The employer will continue to deposit the employer share of social security tax on wages paid to employees who are not qualified individuals, as well as its other payroll taxes – the employer share of Medicare tax on all covered wages, the employee share of social security and Medicare taxes withheld from all covered wages, and federal income tax withheld from wages.

Tax 'holiday' applies to RRTA tax also

The social security tax relief provided by the HIRE Act also applies to Tier 1 of the Railroad Retirement Tax Act tax.

Example: Joe's Auto Body hired Jane Fender, who meets the requirements to be a "qualified individual," on February 22, 2010. Jane is paid \$2,000 semimonthly on the 15th and last day of the month for wages earned through

payday. Joe's Auto Body is not entitled to any social security tax relief on the wages it pays Jane on February 28 or March 15 because those wages were paid before the HIRE Act took effect. For the \$2,000 paid to Jane on March 31, Joe's will deposit its share of social security tax ($\$2,000 \times 6.2\% = \124) and reflect that on its first quarter Form 941. Then Joe's will treat the \$124 as a payment made in the second quarter of 2010 and will take a credit for that payment on its second quarter Form 941.

Form 941 reporting changes

The IRS has revised Form 941, *Employer's Quarterly Federal Tax Return*, beginning with the second quarter of 2010. A draft version of the form includes the following new lines:

- ***Line 6a – Number of qualified employees first paid exempt wages/tips this quarter.*** Report here the number of qualified individuals you have hired who were paid wages or tips that are exempt from the employer share of social security tax under the HIRE Act for the first time in the quarter being reported.

- ***Line 6b – Number of qualified employees paid exempt wages/tips this quarter.*** Report here the number of qualified individuals you have hired who were paid wages or tips that are exempt from the employer share of social security tax under the HIRE Act in the quarter being reported, whether or not they were paid exempt wages or tips in a prior quarter.

- ***Line 6c – Exempt wages/tips paid to qualified employees this quarter.*** Report here the total wages and tips paid to qualified individuals during the quarter being reported that are exempt from the employer share of social security tax under the

HIRE Act.

- **Line 6d.** Line 6c amount X .062.
- **Line 6e – Total taxes before adjustments.** (Lines 3 + 5d– Line 6d = Line 6e).
- **Line 12c – Number of qualified employees paid wages/tips March 19 –**

March 31. Report here the number of qualified individuals you have hired who were paid wages or tips from March 19-31 that are exempt from the employer share of social security tax under the HIRE Act.

• **Line 12d – Exempt wages/tips paid to qualified employees March 19 –**
March 31. Report here the total wages and tips paid to qualified individuals from March 19-31 that are exempt from the employer share of social security tax under the HIRE Act.

- **Line 12e.** Line 12d amount X .062.

▲ **COMPLETE NEW LINES 12c-12e ONLY ON 2nd QUARTER 941** – The new Lines 12c-12e on Form 941 were added so employers could take a credit for the employer social security tax it paid in the first quarter that would have qualified for social security tax relief under the HIRE Act from March 19-31. The employer can take the credit only as a payment during the second quarter, so Lines 12c-12e should not be used for the remainder of the year. Seasonal employers who want to take a credit for qualifying first quarter wages will have to file a second quarter Form 941 even if they don't pay wages in the second quarter.

Schedule B will not be affected

Schedule B (Form 941), *Report of Tax Liability for Semiweekly Schedule Depositors*, which is used by semiweekly payroll tax depositors to report their payroll tax

liabilities on the days when they are incurred, will not have to be revised to take the HIRE Act's social security tax "holiday" into account.

W-2 reporting will be required

According to the IRS, employers will be required to report wages and tips that are exempt from the employer share of social security on an employee's Form W-2 in Box 12 with new Code CC. Form W-3 will be revised to add a new box to report the total of the amounts reported on Forms W-2, Box 12, Code CC.

Trust fund accounts will be made whole

The Act provides that the U.S. Treasury will make whole the social security trust fund and the social security equivalent benefit account for any reductions in employer social security and RRTA taxes.

Separate business tax credit

A different provision of the Act gives an employer a maximum \$1,000 credit against its business income taxes for each qualified individual who is employed by the employer for at least 52 consecutive weeks and whose wages during the second 26 weeks of this period are at least 80% of the wages during the first 26 weeks of the period.

The amount of the credit is the lesser of \$1,000 or 6.2% of the wages paid to the qualified individual during the year. Therefore, if the employer pays the employee \$16,129 or more in wages during the 52-week period, the business tax credit is \$1,000. If the employer pays the employee less than \$16,129, the business tax credit is 6.2% of the wages paid. The business tax credit and the social security tax relief are separate, and employers can claim both of them for the same employees.

Credit applies to FITW wages. Wages paid to domestic workers and employees who can claim the foreign earned income housing exclusion do not qualify the employer for the business tax credit because the credit is limited to wages as defined in IRC §3401(a) – wages subject to federal income tax withholding. For employees for whom the business tax credit is taken, employers will need to be sure to calculate the credit on wages exclusive of deductions for cafeteria and/or deferred compensation plans.

An employer may claim the WOTC on the wages paid during the one-year period after hire to an employee for whom it is claiming the business tax credit under the HIRE Act, as long as it is not also claiming the social security tax “holiday” under the HIRE Act on any wages paid to that employee.

△ **APA OFFERS HIRE ACT WEBINAR** – The APA will present a live 60-minute Webinar, “How the HIRE Act Impacts Your Payroll Processing,” on April 16 at 1:00 p.m. ET. Get all the details on the Act’s requirements and guidance on depositing and reporting issued by the IRS. Check APA’s website at www.americanpayroll.org/product/?cid=49&qid=119 for registration information.