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Labor Law Bulletin

Hire Act Signed Into Law

On March 18, 2010, President Obama signed the Hiring Incentives to Restore Employment Act (the HIRE Act, also referred to as the "jobs bill"), which is intended to create new jobs and provide incentives to employers to hire the unemployed.

The HIRE Act provides tax credits to employers that hire persons who have been unemployed for at least 60 days. The tax credit is 6.2% of the wages paid to those individuals, effectively exempting the employer from having to pay its share of the Social Security tax on those wages through 2010. Thus, if an employer hires an unemployed person and pays that person $106,800 (the FICA wage cap) by the end of 2010, that employer could save $6,621. In addition, employers may claim a supplemental tax credit worth up to $1,000 at the end of a year of employment for each previously unemployed individual they hire. Note that employers generally may not take both the 6.2% tax credit and the $1,000 year-end tax credit for the same employee for the same year.

To take advantage of either the 6.2% tax credit or the $1,000 year-end tax credit, the employer must verify that all of the following conditions are satisfied:

- The employee was hired between the dates of February 4 and December 31, 2010;
- The employee had not been employed for more than 40 hours during the 60-day period preceding his or her date of hire;
- The employee was hired to fill either a newly created position, a position that a prior employee had left voluntarily, or a position from which a prior employee had been terminated for cause; and
- The employee is not a relative of any of the employer's owners, as those terms are defined in the Tax Code.

Because employers are not likely to have firsthand knowledge of their employees' previous employment history, the HIRE Act requires that employers obtain affidavits from their newly hired employees in which they swear under penalty of perjury that they had not been employed for more than 40 hours in the previous 60 days. A sample affidavit is included below.

To eliminate the possibility that an employer may take advantage of the 6.2% tax credit and the year-end tax credit by firing a current employee without cause and hiring an unemployed replacement, the benefits of the HIRE Act are not available where the position filled was vacated as a consequence of the employer's decision to terminate the prior employee without cause. Note, however, that the new hire can be an employee who was previously laid off by the employer.

Employers may claim the 6.2% tax credit for any eligible employee hired after February 3, 2010, regardless of how many hours the employee works (i.e., part-time as well as full-time employees may qualify). However, that credit may not be applied to wages paid prior to March 18, 2010 (the effective date of the HIRE Act). Moreover, no credit may be claimed for the first quarter of 2010. Instead, employers may claim the first-quarter tax credits earned in their second-quarter statements.

The $1,000 year-end tax credit is available to employers that hire and retain a previously unemployed employee for at least 52 consecutive weeks; no partial credit is available if the employee leaves sooner for any reason. The wages paid to the employee in the second 26 weeks of employment must be at least 80% of the first 26 weeks' wages. If these conditions are met, the employer is entitled to claim either $1,000 or 6.2% of the employee's annual wages (whichever is less) as a payroll tax credit. As a practical matter, this equates to a $1,000 tax credit for all eligible employees earning more than $16,129.03 annually, from which an eligible employer will benefit when it files its 2011 tax return.

The Internal Revenue Service is expected to issue guidance on the HIRE Act shortly, including an affidavit form for employers to use. In the interim, employers may consider using an affidavit such as the one provided below.

We encourage you to contact **Laura Sack** (212-407-6960), **Michael Goettig** (212-407-7781) or **Thomas G. Hancuch** (312-609-7824) with any questions.

---- SAMPLE AFFIDAVIT ----

STATE OF ________)
) ss
COUNTY OF ________)

By signing below, I certify that:

1. My employment commenced with **[EMPLOYER]** on **[DATE]**.

2. I was not employed for more than 40 hours during the 60-day period ending on the day I commenced employment with **[EMPLOYER]**.

Under penalty of perjury, I certify that the foregoing is true and correct.

________________________ ______________
[NAME] Date

SUBSCRIBED AND SWORN TO before me
this ____ day of __________________, 2010.

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Questions or comments concerning the Labor Law Bulletin or its contents may be directed to the firm's Labor Practice Leader, Thomas M. Wilde (312-609-7821), the Managing Shareholder of the firm's New York office, Neal I. Korval (212-407-7780) or, in Washington, D.C., Theresa M. Peyton (202-312-3360).