

04.07.2010

**Important New Federal and Colorado Legislation Affecting Employers:
*Tax Incentives for Hiring Unemployed Workers and
Protections When Hiring Employees With Criminal Records***

HIRE Act

On March 18, 2010, President Obama signed into law the [Hiring Incentives to Restore Employment Act](#), Pub. L. 111-147 (the "HIRE Act"). The HIRE Act is a \$17.5-18 billion jobs measure that is intended to jump-start the hiring of individuals who are currently unemployed.¹ The assistance comes in the form of payroll tax relief to employers that, after February 3, 2010 but before January 1, 2011, hire workers who have not been employed for at least 60 days. Employers also can receive an additional \$1,000 tax credit if they retain those new employees on the payroll for at least a year.

The HIRE Act is viewed to be the first among many new jobs bills that are intended to spur economic growth in the United States. As an employer, you should keep an eye out for new opportunities for savings and tax incentives to help your business grow despite these trying times.

How Do Employers Qualify for HIRE Act Benefits?

In order to qualify for the benefits under the HIRE Act, the employer must hire the employee after February 3, 2010 and before January 1, 2011. The employer also must obtain each newly-hired employee's affirmation, in writing and under penalty of perjury, that he or she has not been employed for more than 40 hours during the 60-day period immediately preceding his or her hire date. The new employee must not be a relative of the owner of the business. Finally, the new employee must not be hired to replace another employee, except where the replaced employee voluntarily terminated or was terminated for cause. In other words, the HIRE Act rewards growth, not turnover.

HIRE Act benefits are available to any size businesses, agricultural employers, tax-exempt organizations and public colleges and universities, although other governmental employers generally are not eligible for HIRE Act benefits. Household employers cannot claim HIRE Act benefits.

What Benefits Are Available Under the HIRE Act?

2010 Payroll Tax Exemption for Hiring Unemployed Workers.² For each new employee that meets the criteria under the HIRE Act, the employer is exempt from paying the 6.2% Social Security (OASDI portion) tax for that employee for the remainder of calendar year 2010. This exemption applies to all wages paid to that new employee on and after March 19, 2010 through

¹ Other HIRE Act provisions (i) extend the enhanced small business expensing of certain depreciable business assets for a limited time, (ii) expand the Build America Bonds program by allowing issuers of tax credit bonds used for construction of schools and energy-related projects to elect to receive refundable credits, (iii) extends a number of current highway, public transportation and transit programs, (iv) creates new anti-abuse measures designed to deter U.S. individuals from attempting to hide assets overseas, (v) delays the effective date of the worldwide allocation of interest provision, and (vi) accelerates certain estimated tax payments for very large corporations.

² Section 101 of the HIRE Act. Similar rules apply to Railroad Retirement Taxes.

December 31, 2010. If a qualifying employee receives wages in excess of the Social Security taxable wage cap (\$106,800), the exemption no longer applies. In other words, each new, qualified employee hired can save his employer up to, but not more than \$6,621 in payroll taxes for 2010.

Any Social Security taxes that the employer already may have paid with respect to qualifying employees during the first calendar quarter of 2010 will be treated like an advance on any such taxes owed during the second calendar quarter.

The employer will still need to withhold the employee's 6.2% share of the OASDI tax. In addition, this exemption does not impact the employer's and employee's Medicare taxes that apply to wages.

Employers need not worry that this exemption will negatively impact the new employee's Social Security benefits -- these new employees will receive full benefits computation credit even though the employer portion is excluded from wages.

Business Credit for Retention of Certain New Hires in 2010.³ Employers also can receive a new business tax credit of up to \$1,000 for each qualifying employee who remains on the payroll for 52 consecutive weeks.⁴ The credit is equal to the lesser of \$1,000 or 6.2% of the wages paid to the new employee. This credit will be taken on the employer's 2011 tax return.

To be eligible for this credit, the employer must pay the employee wages during the last 26 weeks of employment that are at least 80% of the wages paid for the first 26 weeks of employment.

What Should Employers Do Now?

The IRS has announced that it will be issuing more details about HIRE Act benefits in the next several weeks.⁵ It also is working on a form for the required employee statement.⁶ On March 22nd, the IRS issued draft payroll tax forms (Form 941) to allow employers to claim the exemption. In the meantime, we recommend that you direct any questions regarding the HIRE Act to your tax attorneys and any questions regarding general hiring practices and policies to your employment law advisors.

Employer Liability Negligent Hiring

On March 25, 2010, Colorado Governor Bill Ritter signed House Bill 1023, Employer Liability Negligent Hiring ("The Act") into law, providing some protection to employers who hire employees with criminal pasts. The Act, enacted to, "reduce unnecessary barriers to employment for persons with a criminal conviction and thereby promote economic opportunity, poverty reduction and public safety" in Colorado, provides that information regarding an employee's or former employee's criminal history may not be used as evidence in a lawsuit against the employer under certain circumstances. Such circumstances include: when the criminal history bears no relationship to the facts of the case, when the record of the criminal

³ Section 201 of the HIRE Act.

⁴ The credit is the lesser of (i) \$1,000 or (ii) 6.2% of the wages paid to the employee for the 52-week period.

⁵ IR-2010-33 (March 18, 2010), <http://www.irs.gov/newsroom/article/0,,id=220326,00.html>.

⁶ A draft Form W-11 can be found [here](#).

history was sealed or the employee received a pardon, when an arrest or charge did not result in a criminal conviction, or where the employee received a deferred judgment that was not revoked.

The Act was sponsored by Representative Mark Waller (R-Colorado Springs) who was concerned that businesses were not hiring applicants with criminal backgrounds, no matter how removed the criminal history may be from the employer's business or the particular position. The Act is intended to alleviate employer concerns regarding negligent hiring lawsuits when hiring ex-convicts and also to give ex-convicts additional employment opportunities. The Act does not completely shield employers from liability in hiring decisions, however, and employers should still be wary of an applicant's criminal past when such background makes the applicant unsuitable for a particular position.

The Act has no effect on any existing laws that require employers to conduct criminal history background checks or consider criminal history records in hiring decisions for certain types of employment. The Act will take effect 90 days after the General Assembly adjourns in the Spring 2010, unless however, a referendum petition is filed against the Act in which case the measure will go on to the November 2010 ballot for a state-wide vote.

This document is intended to provide you with general information about issues related to employment matters. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

David D. Powell, Jr.
dpowell@bhfs.com
T 303.223.1157

Irene F. Gallagher
igallagher@bhfs.com
T 303.223.1124

Nancy A. Strelau
nstrlau@bhfs.com
T 303.223.1151

Austin E. Smith
asmith@bhfs.com
T 303.223.1150

Sarah M. Stettner
sstettner@bhfs.com
T 303.223.1246

Denver Office
410 Seventeenth Street
Suite 2200
Denver, CO 80202-4432

©2010 Brownstein Hyatt Farber Schreck, LLP. All Rights Reserved.