

## **Obama Signs HIRE Act Into Law No Employer Social Security Tax on Unemployed New Hires in 2010**

On March 18, President Obama signed the Hiring Incentives to Restore Employment (HIRE) Act (Pub. Law 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 fill new positions and further stimulate the recovering economy.

**GUIDANCE ON THE WAY** The IRS is expected to issue guidance quickly on the many tax depositing and reporting issues created by the Act. The APA, along with representatives of the service provider community, has been working with the Service for the past few weeks to make implementation as smooth as possible for employers.

**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 the date of enactment (March 18) 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 in furtherance of activities related to the tax-exempt purpose or function of a tax-exempt entity.

*Special rule for 1<sup>st</sup> 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 made on the due date of the employer share of social security tax in the second quarter.

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 social security tax payments for that quarter on wages

paid to employees who are not “qualified individuals.” This payment will be reflected on a revised Form 941 for the second quarter, which is being developed by the IRS.

*Tax ‘holiday’ applies to RRTA tax also.* The social security tax relief provided by the HIRE Act also applies to the employer share of the equivalent Railroad Retirement Tax Act tax.

*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.

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

**Employers can ‘opt-out.’** Qualified employers can elect to not have the social security tax “holiday” apply. The IRS will provide the manner for making such an election.

**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 (IRS is developing a form that employers can use, or they can use their own),
- 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.

*What about rehires?* While the Act doesn’t specifically state whether it applies to employees who are rehired by the same employer, a representative of the Senate Finance Committee who spoke at APA’s Capital Summit on March 12 said that rehired employees would qualify if they meet the same qualifications as new hires.

*Replacements for laid-off employees are not ‘qualified individuals.’* Employees who are hired to replace employees who were involuntarily terminated (unless they were terminated for cause) are not qualified individuals under the HIRE Act even if they meet the other criteria. The Act is designed to encourage employers to create and fill new positions, not replace or hire back employees who were laid off during the recession.

**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 15<sup>th</sup> 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 when it pays its employer social security tax for that quarter, and will take a credit for that payment on its second quarter Form 941.

**No double-dipping with WOTC.** A qualified 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, if those wages qualify the employer for the social security tax "holiday," unless the employer elects not to have the social security tax relief apply.

**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 receives wages during the second 26 weeks of this period that are at least 80% of the wages they received 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.

Wages paid to domestic workers and employees who can claim the foreign earned income 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.

**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 <http://www.americanpayroll.org/product/?cid=49&gid=119> for registration information.