

The HIRE Act: Who, What & How

By George A. Reeves III (Columbia)

In an effort to reduce the nation's unemployment rate and spur job creation, President Obama signed the Hiring Incentives to Restore Employment (HIRE) Act into law on March 18 of this year. Under the HIRE Act, also commonly referred to as the "jobs bill," employers may qualify for tax benefits by hiring workers who were previously unemployed or working only part-time, and for retaining those employees. Specifically, employers who hire qualified individuals between February 3, 2010 and January 1, 2011 may receive a 6.2% payroll tax incentive. You may also claim an additional tax credit of up to \$1,000 per worker if they are retained for a minimum of one year.

Who Is A Qualified Employee?

Not every employee hired in 2010 will qualify the employer for these tax breaks. Instead, an individual must meet certain criteria to be a "qualified employee."

First, employees must begin their employment after February 3, 2010, but before January 1, 2011. Employees who were laid off by the employer but subsequently rehired during this time period can also qualify, so long as the individual meets all of the additional criteria.

Second, individuals must have been unemployed, or employed for less than 40 hours, for 60 days prior to their start date with the employer. The 60-day period must have been a continuous period and may span 2009 through 2010. Also, if you hire a recent graduate, then you may include time the individual spent in school during that 60-day period toward determining eligibility.

In order to claim this tax benefit, the employer must obtain a signed statement from individuals certifying, under penalty of perjury, that they have not worked more than 40 hours during the relevant 60-day period. The IRS has recently issued Form W-11, "Hiring Incentives to Restore Employment (HIRE) Act Affidavit," which you can use to satisfy this requirement. Alternatively, you may use your own form affidavit or other certification, so long as the form uses the same language in the certification as the Form W-11. Whether you use Form W-11 or an equivalent version, the certification is not filed with the IRS but must be kept along with other payroll and income-tax records.

Third, the payroll-tax exemption does not apply to an employee who is hired to replace another employee unless that employee was terminated for cause, or voluntarily separated from employment. But if you lay off an employee due to lack of work, you may still claim the tax credit for wages paid to a new hire if you later rehire the new employee when work picks up.

Finally, to be a "qualified employee," the individual may not be a family member of, or related in other ways to, any individual who owns, directly or indirectly, more than 50% in value of the outstanding stock of the employer nor to any individual who owns more than 50% of the capital and profits interests in the employer.



Who Is A Qualified Employer?

A "Qualified Employer" includes any taxable or tax-exempt private-sector employer, including non-profits and new businesses. The Act excludes federal, state, and local government employees as well as employees of governmental agencies or instrumentalities. But the Act does apply to public institutions of higher education. Finally, household employers do not qualify for incentives under the Act.

In order to take advantage of the tax breaks, a qualified employer need not sign up. Instead, the Act provides for automatic coverage unless an employer opts out. You may wish to opt out of coverage under the Act if, for instance, you utilize the Work Opportunity Tax Credit, as an employer may not receive tax benefits under both programs for the same wages.

Benefits Provided

The purpose of the Act is to spur job growth, and to accomplish this, the Act provides two separate tax benefits to qualifying employers for not only hiring employees, but also for keeping them.

Payroll Tax Exemption

First, employers who hire qualified individuals are eligible for a 6.2% payroll tax forgiveness exempting them from their share of Social Security taxes on wages paid to the individual between March 18, 2010 and December 31, 2010. According to the IRS, this incentive has no effect on the employee's future Social Security benefits, and employers are still required to withhold the employee's 6.2% share of Social Security taxes as well as state and federal income and Medicare taxes.

Business Credit

The second incentive provides a general business credit to employers to retain new hires. In order to take advantage of this credit, you must retain a qualified employee for 52 consecutive weeks during the tax year, and the

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California Courts Weigh In On Non-Compete Agreements

By Ron Brand (Irvine)

In many states, restraints on the practice of a profession, business or trade (such as non-competition agreements) are considered valid, as long as they contain reasonable geographic and time restrictions. But that has not been true in California since 1872. In that year California settled public policy in favor of open competition, and rejected non-competition agreements. In the years since then, the law has evolved substantially, and two recent appeals court cases further refined the situation there. *The Retirement Group v. Galante*, and *Dowell v. Biosense Webster*.

Although these two decisions affect only those doing business in California, employers nationwide have long known that many legal trends, for better or worse, start in California and spread to other geographic areas. This article outlines what's going on in California today.

A Little Background

Current California law states that every contract "by which anyone is restrained from engaging in a lawful profession, trade or business of any kind" is void. The law does allow non-competition agreements in the context of an owner 1) selling the goodwill of a business; 2) disposing of all shares in a corporation; 3) selling all or substantially all of the operating assets and goodwill of a business, or 4) upon a partner dissolving or withdrawing from a partnership.

In addition to these statutory exceptions, California courts have created a judicial exception for cases where a former employee uses a former employer's trade secrets or confidential proprietary information to solicit the business of the former employer's customers, or to engage in other types of unfair competition.

In the years since 1872, California courts have consistently affirmed that State law evinces a settled public policy in favor of open competition and employee mobility, and have interpreted that law broadly.

In 2008, the California Supreme Court reinforced California's prohibition of covenants not to compete in the case of *Edwards v. Arthur Andersen*. (See our Legal Alert dated August 11, 2008 entitled "California Supreme Court Rules on Non-compete Agreements and On General Release."). Prior to the *Edwards* decision, the law in California was unclear regarding the validity of covenants not to solicit customers that were not tied to the protection of trade secrets or confidential information.

The *Galante* and *Dowell* cases have seemingly expanded the Supreme Court's reasoning in *Edwards* to invalidate covenants not to solicit customers, unless they are tied to the protection of trade secrets or confidential information.

The Holding in *Galante*

In *Galante*, the trial court issued an injunction against the defendants prohibiting them from, among other things, directly or indirectly soliciting any of the company's current customers to transfer securities accounts or relationships to defendants. The defendants challenged this portion of the injunction asserting that the relief granted violated *Edwards*. After extensive analysis of *Edwards*, the court held that this portion of the injunction violated California law since it was not tied to the protection of the company's trade secrets or confidential information, but was

a wholesale prohibition on the mere solicitation of customers. The court reasoned:

[T]he courts have repeatedly held a former employee may be barred from soliciting existing customers to redirect their business away from the former employer and to the employee's new business if the employee is utilizing trade secret information to solicit those customers. * * * Thus, it is not the solicitation of the former employer's customers, but is instead the misuse of trade secret information, that may be enjoined. * * * Application of these principles here convinces us the injunctive provisions . . . on their face violate *Edwards* and . . . cannot rationally be upheld as an injunction limited in scope to the only legitimate protection (*i.e.*, enjoining the misappropriation of [plaintiff's] trade secrets) for which injunctive relief may be issued.

The Holding in *Dowell*

In *Dowell*, after several employees left one biotech company (Biosense Webster) to work for a competitor, the two rival biotech companies went to court over the enforceability of the restrictive covenants contained in Biosense Webster's confidentiality agreement. The agreement contained a non-solicitation provision which prohibited the employees for a period of 18 months after termination of employment from soliciting any business from, selling to, or rendering any service to Biosense Webster's clients or customers with whom the employee had contact during the last 12 months of employment.

The court ruled that the non-solicitation provision violated *Edwards* because it restrained the employees from practicing in their chosen profession. Biosense Webster argued that the provision was enforceable because it was narrowly tailored to protect trade secrets or confidential information. The employees argued that, pursuant to *Edwards*, the trade secrets exception is no longer viable. Although the court doubted the continuing viability of the trade secrets exception in California, it did not resolve that issue. Instead, the court held that because the non-solicitation provision was not narrowly tailored or carefully limited to the protection of trade secrets, but was so broadly worded as to restrain competition, the trade secrets exception did not apply.

How *Galante* and *Dowell* Affect California Employers

It's clear that California courts are becoming increasingly reluctant to enforce covenants not to solicit customers that prohibit the mere solicitation of customers and are not narrowly tailored to protect trade secrets or confidential information, such as the ones at issue in *Galante* and *Dowell*. But California is not the only area where laws change and court rulings can modify previously settled doctrines.

If you are currently using a covenant not to solicit customers, or considering creating one, we suggest you have it reviewed by counsel to ensure that it complies with the law of your state. This is especially true for California employers. Attempting to enforce an invalid covenant not to solicit customers, not hiring an applicant because he or she refuses to sign one, or terminating current employees because they refuse to sign one, could expose your company to liability.

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Automotive Supplier Pays Heavy Price In EEOC Settlement

By Jeff Savarise and Tim Weatherholt (Louisville)

A recent settlement of a complaint alleging sexual harassment, disability discrimination, and retaliation brought against an automobile supplier illustrates the potential liability for employers who even arguably violate the law. An automotive supplier agreed to pay \$388,500 to a former female employee, and an additional \$40,000 to two other plaintiffs to settle these charges. *EEOC v. Eagle Wings Indus. Inc.*

Sordid Charges

Kimberly Bridgman alleged that Eagle Wings Industrials had subjected her and a class of female employees to harassment because of their sex. The alleged comments were certainly lewd and included a request for oral sex in exchange for a transfer.

According to the EEOC, the harassing conduct caused Bridgman to take disability leave between January 2006 and September 2006. When the conduct continued, she claimed that she was forced to go on disability leave again. Eagle Wings then refused to reinstate her unless she agreed to undergo a battery of psychological examinations. She then claimed to be constructively discharged after she refused to submit to the examinations, which she claims were intimidating and clearly violated the Americans with Disabilities Act.

Eagle Wings chose to settle the matter and enter into what is called a Consent Decree.

The Cost Beyond The Money

A troubling aspect of the settlement from the employer's perspective is not only the cost associated with settling the matter but also the additional requirements set forth in the Consent Decree, which imposed onerous recordkeeping, reporting, and training requirements.

As to recordkeeping, the Consent Decree states that for a period of two years, Eagle Wings must maintain and make available for inspection and copying by EEOC, records (including names, addresses, and telephone numbers) of each employee or applicant who complains of sexual harassment or disability discrimination. The decree also requires the company to maintain such records whether such report or complaint is made formally or informally. Such records shall include the name of the complainant, the date of the report or complaint, what was alleged, the name(s) of any witnesses, what actions, if any, Eagle Wings took to resolve the complaint, and the resolution of the report or complaint.

As to reporting, Eagle Wings must submit semi-annual reports to the EEOC regarding its legal compliance. Additional training is also required – the company must provide annually for two years, EEOC-approved training on sexual harassment, disability discrimination, retaliation, and Eagle Wings' policies regarding such discrimination.



More To Come?

The lesson for employers is clear: employees, particularly supervisors, should be thoroughly and frequently trained on employment laws, particularly harassment law, and complaints should be taken very seriously. While training may not be able to correct all unlawful behavior, it could help limit liability. And it's better to engage in training on the front end than on the back end.

And note that the case was prosecuted by the EEOC on behalf of the employee, which is not typical. But the EEOC has recently received a large amount of additional funding from the Obama administration, and we expect that this trend of vigorous prosecution

from the EEOC on behalf of individual plaintiffs will only increase.

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employee's pay during the last 26 weeks of the period must equal at least 80% of the wages for the first 26 weeks of the same period.

For each employee meeting this criteria, employers will receive a credit in the amount of either \$1,000 for each qualifying employee retained for at least 52 consecutive weeks, or 6.2% of wages paid to the qualifying employee over the 52 week period, whichever is less. While an employer may carry this credit forward, it may not be carried back to a previous year.

How To Claim Benefits

Beginning in the second quarter of 2010, employers may claim the payroll tax exemption on the Employer's Quarterly Federal Tax Return, Form 941. You may also claim the payroll tax exemption for wages paid between March 19 through March 31, 2010 on the Form 941 for the second quarter of 2010. The IRS has revised Form 941 for use beginning with the second quarter of 2010. A final form, along with instructions, is expected to be available in May 2010 according to the IRS.

Finally, businesses will be able to claim the new hire retention credit for employees retained for 52 consecutive weeks on their 2011 income tax returns.

Taking Advantage Of The HIRE Act

Whether you have already begun hiring employees, or are considering doing so later in the year, there are a few steps that you should take in order to prepare to take advantage of these tax benefits:

Determine which of your employees qualify

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If you have hired employees since February 3, 2010, identify those individuals who may qualify and be sure to obtain a signed Form W-11 from any employees who were not employed more than 40 hours in the 60 day period before their start dates. Also, review the positions that employees have filled to determine if they replaced anyone. If so, the new hire may not qualify unless the former employee was terminated for cause or voluntarily separated.

Coordinate with Payroll

Your human resources department should coordinate with your payroll and tax department or providers and notify them whenever a qualified employee is either identified or hired to ensure that proper credit is taken in the second quarter for those previously hired in the first quarter, and to make sure that the proper credit is being taken in subsequent quarters for new hires.

Determine if you should opt out of coverage for an employee

Review each qualifying employee to determine whether or not you want the Act's automatic coverage to apply to that employee. If the employee qualifies for Work Opportunity Tax Credit, for example, then you may want to opt out of coverage under the HIRE Act as the tax benefits may be greater.

Prepare for 2011

In order to claim the business credit in 2011, you will need to know how many employees you have that qualify. Create HIRE Act records to record each qualified employee's date of hire to determine if the employee reaches the consecutive 52 week mark. Also, keep signed W-11 forms on file with other payroll and tax records.

Comply with Other Laws

As with any decision related to hiring, always follow applicable state and federal employment laws. In making decisions as to whether or not to retain a qualified employee, compliance with employment laws should always take precedence over consideration of tax benefits under the HIRE Act.

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