



A Crash Course in The New HIRE Act

By George A. Reeves III (Columbia)

Newly-hired teachers and staff may provide your school with tax benefits under recently enacted legislation. On March 18, 2010, President Obama signed the Hiring Incentives to Restore Employment (HIRE) Act into law as part of an ongoing effort to reduce the nation's unemployment rate and spur job creation. 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.

Tax Benefits

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 individuals between March 18 and December 31, 2010. According to the IRS, this incentive has no effect on the employees' future Social Security benefits, and employers are still required to withhold the employees' 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, an employer must retain a qualified employee for 52 consecutive weeks during the tax year, and the 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.

Does My School Qualify as an Employer?

Under the Act a "Qualified Employer" includes any taxable or tax-exempt private sector employer, including non-profits, as well as public institutions of higher education.

Which Employees Are Covered?

Not every employee hired in 2010 will qualify for tax breaks under the Act. 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, the individual must have been unemployed, or employed for less than 40 hours, for 60 days prior to their start date with the employer. We anticipate that some schools may ask whether the fact that teachers are not working during the summer months may count as a 60-day unemployment period. We do not believe that would likely pass muster.

Teachers who worked during 2009/2010 were likely offered a contract to return for the 2010/2011 school year in the spring. Thus, they were already promised re-employment, commencing August or September 2010. Moreover, throughout the summer months, most schools consider teachers to be actively employed as evidenced by the continuation of insurance benefits within the employee group rate. Therefore, although the law is not 100% clear on this issue, it is our opinion that a school would act with great risk in characterizing such teachers as "unemployed" in the summer months.

The 60-day period must have been a continuous period and may span 2009 through 2010. Also, if an employer hires a recent graduate, then the employer may include time the individual spent in school during that 60-day period toward determining eligibility (i.e. count the school attendance period as "unemployed").

In order to claim this tax benefit, the employer must obtain a signed statement from the 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 can be used to satisfy

Continued on page 3

Willkommen, Bienvenue, Welcome

Open Doors for International Faculty and Students

By Kim Thompson (Atlanta)

In today's global economy, more and more educational institutions are seeking to create a culturally diverse educational experience at the elementary, secondary and post-secondary levels through foreign student enrollment and through accessing the international community for faculty and professional staff. Attracting top notch students, teachers and researchers from other countries not only adds to the bottom line (especially in these tougher economic times) but opens doors to an international reputation and recognition.

Students

Many believe that preparing U.S. students for a global society and providing foreign students exposure to U.S. education and values offers the opportunity to strengthen international and cross-cultural knowledge and skills. Educating international students in the U.S. also may provide opportunities for U.S. students to establish long-term relationships with individuals from other countries, expose them to foreign languages, and foster a greater understanding and interest in foreign relations.

Educational institutions seeking to admit foreign students in F-1 status must first be certified by U.S. Immigration and Customs Enforcement (ICE) to issue Form I-20 under the Student and Exchange Visitor Information System (SEVIS). The admitted student will be authorized to study only at the institution designated on Form I-20. Approved institutions must keep computerized SEVIS records on all Form I-20 students and notify SEVIS when the student starts, drops below a full course of study, fails to report to school, transfers schools, extends his or her stay, or engages in off-campus employment, curricular practical training or optional practical training.

Secondary school and college and university students may also attend school in J-1 status (exchange visitor) based on a valid DS-2019 issued by the educational institution. Approved institutions must keep SEVIS records and comply with SEVIS requirements for the J-1 designation in a similar manner to the F-1 requirements. Post-secondary students may be admitted in J-1 status for the time that is needed to complete the degree plus 18 months of practical academic training. Post doctoral degree J-1 visa holders are admitted for the degree program plus up to 36 months of academic training granted in 18 month increments.

Foreign students may not attend public elementary schools or publicly funded adult education programs. A foreign student may attend a public secondary school only if he or she attends for a period not to exceed 12 months and reimburses the school the full, unsubsidized per capita cost of the education.

Faculty, Scholars, and Researchers

Attracting and retaining foreign scholars, researchers, and teachers to the U.S. may serve to strengthen our competitiveness in the global economy. Seeing the world through another's eyes allows us to better understand the international market and offers the opportunity to create a globally literate generation ready to operate in the world arena.

Professors and research scholars, short-term scholars, and teachers, may enter the U.S. on a variety of temporary nonimmigrant visas.

J-1 professors and scholars generally are limited to a period of stay of five years and short-term scholars under this designation are authorized for a six month stay. Certain J visa holders are required to return to their home country upon

completion of the J-1 program and be physically present for two years before being able to apply for immigrant status or H or L status unless they obtain a waiver of this requirement.

H-1B visas are available for individuals in a specialty occupation (defined as one requiring a theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty or the equivalent). There is an annual cap of 65,000 H-1B visas plus 20,000 visas reserved per year for individuals who have earned a master's or higher degree from a U.S. institution of higher education.

Employees of public, primary, and secondary schools eligible for H-1B are subject to a cap. If the cap is reached the school will not be able to submit any new H-1B visa petitions. Institutions of higher education, related or affiliated nonprofit entities, or nonprofit research organizations or governmental research organizations, are exempt from the cap and as a result may submit H-1B visa petitions at any time even if the annual cap is reached.

The annual cap applies only to individuals who were not counted against the cap within the past six years even if changing employers. H-1B



Continued on page 4

A Crash Course in The New HIRE Act

Continued from page 1

this requirement. This form 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 an employer lays an employee off due to lack of work, the employer may still claim the tax credit for wages paid to a new hire if the employer later hires 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.

Does My School Have To Sign Up?

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

How Does My School Claim These 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. Employers 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 your school has already begun hiring employees, or is considering doing so later as the next school year approaches, there are a few steps that you should implement in order to prepare to take advantage of these tax benefits:

Determine which of your employees qualify

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. Teachers who sign contracts in the spring to return the following fall will not be qualified employees under the Act as they will not be considered “unemployed” during the summer break.

Also, review the position that an employee has filled to determine if he or she replaced an employee. 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. For example, if the employee qualifies for the Work Opportunity Tax Credit, that may offer a greater tax benefit than the HIRE Act, so you may want to opt out of the latter.

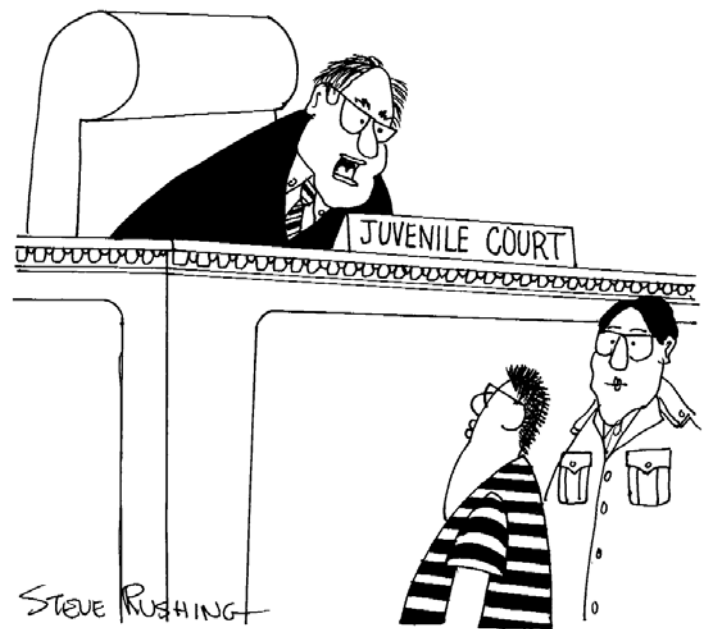
Prepare for 2011

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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“OH, GROW UP.”

Willkommen, Bienvenue, Welcome

Continued from page 2

employers must certify to the U.S. Department of Labor that they will pay the required wage, provide working conditions that will not adversely affect other similarly employed workers, and that there is no strike or lockout in the occupational classification. If an H-1B employee is terminated before the end of the approval period, the employer is liable for the reasonable costs of return transportation abroad of the foreign national.

H-1B1 (reserved for citizens of Chile and Singapore) and E-3 (reserved for citizens of Australia), have similar requirements to the H-1B designation with respect to the specialty occupation aspect of the position. Unlike the H-1B visa applicant, the H-1B1 and E-3 applicant may apply directly at the U.S. Consulate without first obtaining approval from the U.S. Citizenship and Immigration Services (USCIS), are allowed unlimited extensions, and are not allowed to have dual intent (meaning they cannot have the intention of being in the U.S. on a temporary basis and have a long term intent to remain permanently).

O-1 visas are reserved for persons who can demonstrate extraordinary ability in the sciences, arts, education, business or athletics. The foreign



national must seek to enter the U.S. to continue the type of work for which he or she has extraordinary ability. Extraordinary ability is defined as a level of expertise indicating that the person is one of the small percentage who have risen to the top of the field.

An individual may prove sustained national or international acclaim by receipt of a major internationally recognized award such as Nobel Prize or by documenting at least three of the following: 1) receipt of a national or international recognized award; 2) membership in an organization requiring outstanding achievement; 3) published materials about the individual in professional or major trade publications; 4) judgment of the work of others in the field; 5) original scientific or scholarly work of major significance; 6) authorship of scholarly works; 7) evidence that they have been employed in a critical or essential capacity at an organization with a distinguished reputation; and 8) that they have commanded or will command a high salary in relation to others in the field.

R-1 visas are reserved for a person working in a professional capacity in a religious vocation or occupation. The religious occupation must be an activity which relates to traditional religious functions. The beneficiary of the R-1 visa petition must be able to show that for at least two years immediately preceding, he or she has been a member of the bona fide religious denomination.

Canadian and Mexican citizens are eligible to apply for TN visas as professionals under the North American Free Trade Agreement (NAFTA). The TN category has similar requirements to the H-1B category except that there is no limit to the number of extensions allowed and the beneficiary may not have dual intent. Generally, a position under this designation will be one requiring at least a bachelor's degree and must be included on the list of TN professions, such as college, seminary, or university teacher, librarian, or computer systems analyst.

The TN, E-3 and O-1 visa classifications are allowed unlimited renewals as opposed to the H-1B, J-1, and R-1 designations. If you wish the H-1B, J-1 or R-1 foreign national to remain in the U.S. beyond the maximum allowed time, you would be required to apply for permanent residence for that individual. Requirements for permanent residence vary by visa category.

The Potential Rewards

Tap into the international marketplace for foreign students and faculty. Take advantage of the various nonimmigrant visa categories to create a culturally-diverse educational experience. The key to positioning the U.S. to be competitive in the global economy in the future may start in your classroom.

For more information contact the author at kthompson@laborlawyers.com or call 404.231.1400.

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