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Patricia Hughes Mills J.D., LL.M. on

Hiring Incentives to Restore Employment Act (H.R. 2847)

Driving Employment Recovery

2010 Emerging Issues 4909

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The Hiring Incentives to Restore Employment Act (referred to as the “HIRE” Act, or as the “Jobs Bill”),¹ contains several tax provisions. One set of provisions is designed to encourage employers to hire unemployed workers by creating a payroll tax holiday for employees hired in 2010, along with an employer tax credit if those employees are retained for a year. The Jobs Bill also increases the amount of business assets that may be expensed for 2010, and expands the Build America bonds program.

Payroll Tax Forgiveness. The employer-paid Old-Age, Survivors, and Disability Insurance tax of 6.2 percent on wages (the “OASDI tax,” part of the “FICA” or “Social Security” tax) is a significant cost to employers. The Jobs Bill provides relief from the employer share of the OASDI tax, and essentially exempts employers from paying the 6.2 percent Social Security tax on certain new employees from the date of enactment through 2010.² This payroll tax forgiveness is available for all non-governmental employers.³ The provision applies to wages paid after the date of enactment⁴ and ending on December 31, 2010. The key to this benefit is that the worker must be a “qualified individual,” which is defined as an individual who:

- (1) begins work for a qualified employer after February 3, 2010 and before January 1, 2011;
- (2) certifies by signed affidavit (under penalties of perjury) that he or she was employed for a total of 40 hours or less during the 60-day period ending on the date such employment begins;

1. SA 3310 to H.R. 2847.

2. HIRE Act § 101. The employer remains responsible for the Medicare Hospital Insurance amount of 1.45 percent of covered wages.

3. For these purposes, a qualified employer, eligible for the payroll tax relief, includes public higher educational institutions. [IRC § 3111\(d\)\(2\)\(B\)](#), as amended by HIRE Act § 101(a).

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(3) is not being employed to replace another employee unless such employee separated from service voluntarily or for cause; and

(4) is not a party related to the employer.⁵

This provision is elective, in that employers can choose to pay their share of the OASDI tax if they wish. Why would an employer not want to take advantage of this payroll tax forgiveness? If an employer takes advantage of the payroll tax forgiveness, then the employer is not entitled to receive the work opportunity tax credit (WOTC) on those wages for a one-year period beginning on the hiring date of that individual. The WOTC⁶ is part of the general business credits available under [IRC § 38](#), and is available for employers who hire members of certain groups, such as veterans, those receiving food stamps or other public assistance, and other targeted groups. The work opportunity credit is equal to 40 percent of the first \$6,000 of wages paid to employees who are members of the targeted groups. The WOTC provides a credit against income, but is subject to limitations, in combination with other business credits. Thus, employers need to determine which available tax benefit – the payroll tax forgiveness or the work opportunity credit – produces the most favorable result.

The net benefit to the employer of this payroll tax holiday will depend on the employer's tax bracket, since the payroll taxes are deductible business expenses. Thus, for an employee making less than the Social Security maximum wage base,⁷ an employer in a 35 percent tax bracket will save a cost of approximately 4 percent of the employee's wages under this provision (6.2 percent x 35 percent).

Since the estimated cost of this provision is \$13 billion, in order not to impact the Social Security fund, the new law provides that the Federal Old-Age and Survivors Trust Fund and the Federal Disability Insurance Trust Fund will receive transfers from the General Fund of the United States Treasury equal to the reduction in payroll taxes as a result of this provision.⁸

5. IRC § 3111(d)(3), as amended by HIRE Act § 101(a).

6. [IRC § 51](#).

7. For 2010, \$106,800.

8. HIRE Act § 101(c).

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The Jobs Bill does not apply the payroll tax holiday for wages paid during the first calendar quarter of 2010. However, the amount of the OASDI that would have been reduced under the payroll tax holiday provision during the first calendar quarter shall be treated as a payment of OASDI tax for that employer's second calendar quarter. The HIRE Act permits a similar payroll tax holiday for railroad retirement purposes that parallels the OASDI holiday rules for other employers.

Tax Credit for Retaining Workers. Current law provides for several types of business tax credits.⁹ Under the Jobs Bill, employers who hire workers eligible for the payroll tax forgiveness and retain them for a minimum period will be entitled to a general business credit, which, under the Senate version of the Bill, is \$1,000 for each retained worker.¹⁰ This applies to those workers who qualified for the payroll tax forgiveness described above if those workers:

- are employed during the taxable year;
- continue to be employed by that employer for at least 52 consecutive weeks; and
- do not have a substantial decline in compensation during the last half of that period.¹¹

This credit may not be carried back to taxable years prior to the date of enactment.¹² Thus, the credit will benefit the employer's 2011 return, since it applies only to workers hired in 2010, who must remain employed for 52 weeks.

Additional Expensing of Business Property. [IRC § 179](#) allows certain taxpayers to elect to currently deduct (or "expense") the cost of qualifying property¹³, rather than take

9. [IRC § 38](#).

10. HIRE Act § 102.

11. The employee must receive wages during the second 26 weeks of that 52-week period that are at least 80 percent of the wages earned during the first 26 weeks. HIRE Act § 102(b).

12. HIRE Act § 102(c). The general business credit of IRC § 38, of which this new credit will be a part, can generally be carried back one year, to the extent the credit exceeds the current year's tax liability. [IRC § 39](#)(a)(1).

13. Qualifying property is defined as depreciable tangible personal property that is purchased for use in the active conduct of a trade or business. [IRC § 179](#)(d)(1).

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depreciation deductions on the property over time. For 2009, the limit on the amount that could be expensed under [IRC § 179](#) was \$250,000. For 2010, however, as in effect prior to the enactment of HIRE, the amount that a taxpayer was allowed to currently expense was scheduled to be \$125,000.¹⁴ That amount is further scheduled to be reduced to \$25,000 for 2011.

The Jobs Bill provision increases for one year the amount that may be expensed under [IRC § 179](#) to \$250,000, thus maintaining the 2009 levels. This provision is only for years beginning after 2009 and before 2011. The \$250,000 amount is reduced, but not below zero, by the amount by which the cost of qualifying property placed in service during the taxable year exceeds \$800,000. Thus, the Jobs Bill essentially continues the amount that was allowed to be expensed in 2009 through 2010. Note that [IRC § 179](#) applies to a business's tax year rather than the calendar year – that is, the new limits will apply to tax years beginning in 2010.

Making the Build America Bonds Available for Tax Credit Bonds. The American Recovery and Reinvestment Act of 2009 introduced the Build America Bonds,¹⁵ authorized under [IRC § 54AA](#), allowing state and local governments to borrow at lower costs. Build America Bonds are government bonds, the interest on which is subsidized by the federal government by means of a tax credit to the holder, or, in certain cases, by a direct payment to the issuer. Qualified Tax Credit Bonds, authorized under [IRC § 54A](#), generally are not interest-bearing obligations, but rather provide the holder a tax credit, and include clean renewable energy bonds, qualified energy conservation bonds, qualified zone academy bonds, and qualified school construction bonds.¹⁶

The HIRE Act expands the Build America Bond model by making it available to other qualified Tax Credit Bonds. The legislation will allow issuers of Tax Credit Bonds to treat bonds issued after the date of enactment as Build America Bonds, thus qualifying for direct subsidy.¹⁷ The Bill also makes certain changes to the tax credit bond provisions.

14. IRC § 179 generally allowed a deduction for up to \$125,000 for qualified property purchased in taxable years after 2006 and before 2011, with inflation adjustments, but this limitation was increased for 2008 and 2009 as part of the Economic Stimulus Act of 2008, P.L. 110-185 § 102(a), and the American Recovery and Reinvestment Act of 2009, P.L. § 111-5, § 1202(a)(1). Thus, for 2008 and 2009, the § 179 amount was \$250,000, but was scheduled to return back to the \$125,000 in 2010.

15. [IRC § 54AA](#), added by P.L. 111-5, § 1531(a).

16. See [IRC § 54A](#).

17. HIRE Act § 301.

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Offset Provisions: Foreign Account Reporting, Payments to Foreign Financial Institutions and Foreign Entities. The Bill imposes a 30 percent withholding tax on withholdable payments made to broadly defined foreign financial institutions and non-financial foreign entities that do not comply with new information reporting obligations. “Withholdable payments” includes dividends, rents, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodic gains, profits, and income from U.S. sources.

Additional reporting requirements apply to foreign financial assets, including equity investments in passive foreign investment companies. New reporting requirements and non-compliance penalties also apply to foreign trusts.

What’s Missing? What’s not included in the current Jobs Bill is an extension of many tax provisions which expired at the end of 2009, including, among others, the additional standard deduction for real property taxes, the state and local sales tax deduction, the deduction of environmental remediation costs and qualified leasehold improvements, and credits for biodiesel and renewable diesel fuel. However, on March 10, the Senate passed H.R. 4213, the “American Workers, State, and Business Relief Act,” which reinstates and extends through 2010 a number of tax provisions that expired at the end of 2009. This bill will have to be reconciled with the version of H.R. 4213 passed by the House in December as the “Extenders Act of 2009.”

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About the Author. Patricia Hughes Mills received her Juris Doctorate degree, *magna cum laude*, from Syracuse University, and her LL.M. in Taxation, *magna cum laude*, from the University of San Diego. A past member of the Executive Committee of the State Bar of California Taxation section, Professor Mills practiced law for 15 years before joining Arthur Andersen for several years in their real estate and partnership tax practice. She is now a Professor of Clinical Accounting at the University of Southern California, where she teaches in the Masters of Business Taxation program. She has written several chapters for Powell on Real Property (Michael Allan Wolf, ed., LexisNexis) and other LexisNexis publications.

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