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APA Has Many Successes with Congress, IRS in Implementation of HIRE Act

While employers may be scrambling to deal with the HIRE Act – a law that requires special tracking of wages paid as early as the day after enactment and that has retroactive effects with regard to some recently hired employees – the American Payroll Association has definitely made the implementation process easier than it might have otherwise been.

“The HIRE Act significantly changes the way employers process new hires, deposit taxes, and file employment and business tax returns,” says Scott Mezistrano, CPP, APA Senior Manager of Government Relations. “We are in constant contact with the Internal Revenue Service to help them issue clear guidance so American businesses can take advantage of the Act’s tax benefits and avoid errors and penalties.”

APA conveys your concerns to IRS

Under the Hiring Incentives to Restore Employment (HIRE) Act, a business does not have to pay the employer share of social security tax on wages paid from March 19 through December 31, 2010, to employees who are hired after February 3, 2010, and who certify they have not worked more than 40 hours during the 60-day period before beginning work for the new employer.

Many of the explanations provided in PAYROLL CURRENTLY (Issue No. 4, Vol. 18) were provided by the IRS at the request of the APA, based on questions and concerns raised by our members. The APA worked closely with the IRS’s Chief of Employment Tax to document HIRE Act issues for his superiors, and we were invited to submit revisions to the list of Frequently Asked Questions that the IRS will answer on its website. If you have any questions or concerns you would like raised with the IRS, send them to smezistrano@americanpayroll.org.

Apply exemption to wages paid, not services performed

The APA began its work on the HIRE Act with multiple Congressional committees, expressing concern that, as originally written, the Act would have removed the employer social security tax on wages *earned* during a particular period, as opposed to wages *paid* during that period. We explained that payroll systems track wages based on when they are paid, not when they are earned, and as the legislative language continued to develop, there was a change of emphasis to “wages paid.” The IRS has confirmed this interpretation in its guidance.

Improvements to employee certification process

Before an employer can enjoy any tax savings under the

HIRE Act, it must get a certification from the employee that he or she has not worked more than 40 hours during the 60-day period before beginning work for the new employer. We encouraged the IRS to create a model form for employers, and the IRS did just that with the new Form W-11, *Hiring Incentives to Restore Employment (HIRE) Act Employee Affidavit* (www.americanpayroll.org/members/Forms-Pubs/#not).

After seeing IRS’s first draft of the form, APA made many suggestions. Those already incorporated into the form include:

- Changing what was “date of hire” to “first date of employment” to avoid confusion.
- Explaining in the “Instructions to the Employer” that the employee must provide a certification before the employer may claim either or both the payroll tax exemption or the new hire retention business tax credit.
- Including in the employer instructions that the employer may use its own form if it contains similar information and the employee signs it under penalties of perjury.

Other clarifications we have told the IRS we would still like to see (possibly as part of IRS’ Frequently Asked Questions) include:

- Whether termination “for cause” includes termination for performance issues. (The IRS has told us that it does. Explaining this on the form would let more employers reap the benefits on more employees.)
- Whether employers may collect these certifications and employee signatures via an electronic system. (The IRS has told us that employers may do so, following the rules for electronic W-4 systems.)
- Whether providing services as an independent contractor during the 60-day period would be considered “working.” (We have told the IRS that we don’t interpret the law that way, since it says, “... such individual has not been employed ...,” but someone could easily interpret the current language of the W-11 that way.)
- Whether receiving severance pay during this period would disqualify one from being “unemployed.”
- An explanation that the HIRE Act does not apply to wages paid to household employees.

Changes to Form 941 and tax deposits

There will be special lines on Form 941 to calculate the “forgiveness” of employer social security tax. As these were developed, the APA was in constant contact with the IRS – and also with the Social Security Administration, because the

reduction in the social security tax liability will have to be recorded in a way that does not hamper the reconciliation of social security wages and taxes between the 941s and Forms W-2.

However, to avoid having to change systems in time for the first quarter (1Q) 941, the forgiveness for 1Q will be calculated on the 941 for 2Q and considered a "payment" in 2Q. The Act states that the payment will be treated as made on the due date of the employer share of social security tax in 2Q. Knowing that employers will want to reduce their first deposit in 2Q by the full amount of the tax savings accrued from 1Q, we were concerned that this reduction may be more than the amount of just the employer share of social security tax from the first payroll of 2Q and that employers might create a tax deposit shortfall for themselves. We explained this to the IRS, and the IRS has said it will treat the payment as being made on the first day of 2Q (April 1).

Detail reporting of exempt wages/taxes

In conversations with congressional staffers and IRS officials, we argued against an attachment to Form 941 on which employers would list the names, social security numbers, and hire dates of qualified individuals, as well as the amount of their "exempt" wages and tips (wages and tips paid March 19 to December 31). Federal reporting of employee-level details on a quarterly basis is not something payroll systems are currently designed to do.

However, the exempt wages and tips will be reported on Form W-2 (Box 12, using the new code CC), and there will be a new box on Form W-3 to report the total of the individual code CC amounts.

There has been some discussion among employers, payroll service providers, and the IRS as to whether the code CC amount should include the exempt wages/tips from 1Q. Technically, because of how the law is treating what would be a reduction in tax from 1Q as a payment in 2Q, some are interpreting the law as saying that the wages in 1Q aren't really exempt and should not be reported in code CC.

The IRS prefers to include the relevant wages from 1Q in code CC, so it can reconcile them against the tax reduction calculations on the year's Forms 941, and it asked the APA for feedback on whether it would be a significant burden to report the full year of exempt wages/tips (including 1Q) in Box 12 with code CC. The APA polled its Strategic Payroll Leadership Task Force and

reported to the IRS as follows:

- 15% said it would be a significant burden. Due to the timing of the enactment and implementation of the HIRE Act, it would be easier to capture the relevant wages from 1Q on a company-wide basis for purposes of 941 reporting, and to begin capturing the data at the employee level starting in 2Q.
- 19% said it would pose only a slight additional burden.
- 17% said it would pose no additional burden.
- 49% said it would be less burdensome than separating the 1Q wages from the rest of the year and reporting only the exempt wages for 2Q-4Q in Box 12 with code CC.

Effect on tax deposit due dates

We have not had a determination from IRS on this issue, but we have expressed our interpretation (see below) and asked for guidance. The IRS said it will address this in the FAQ being developed:

- The reduction in tax based on exempt wages paid in 1Q will have no impact on either the determination of an employer's tax deposit frequency in future years (based on the total taxes during the lookback period) or the application of the next-day deposit rule (when the tax liability accumulates to \$100,000 or more). This is because what would be a reduction in tax for 1Q is being considered a payment in 2Q and will have no impact on Form 941 line 10 ("Total taxes after adjustment for advance EIC").
- However, the forgiveness on wages paid in 2Q-4Q is truly a reduction in liability and will affect both of those items.

Effect on Schedule B

Again, we have not had a determination from the IRS on this issue, but the APA has expressed its interpretation (see below) and asked for guidance. The IRS said it will address this in the FAQ being developed:

- During 1Q, an employer will make its entries of tax liabilities on Form 941 Schedule B (or line 17 for monthly depositors) as if there is no tax forgiveness. This way, Schedule B (or line 17) will match line 10.
- During each of 2Q-4Q, an employer will make its entries of tax liabilities taking into account the reduced tax due to the tax forgiveness on wages paid in that quarter. However, the reduction taken in 2Q based on exempt wages/tips from 1Q will not be considered in calculating the liabilities, because this forgiveness is being considered a "payment," not a reduction in liability. This way, Schedule B (or line 17) will match line 10. ■

OCSE Asks Employers for Help Revising IWO

The Office of Child Support Enforcement has asked the APA for help with the next revision of its standardized *Income Withholding for Support order/notice* (IWO). OCSE is looking to address issues that cause employers unnecessary administrative burden. Specifically, OCSE would like to make the order clearer with regard to what it has identified as employers' two biggest challenges:

- Receiving new orders to withhold child support that are not on the government-approved IWO form, and
- Processing new and existing orders that do not direct payment to the state disbursement unit (SDU).

OCSE is also reaching out to the judiciary and to state child support agencies for their input. The current IWO expires on October 31, 2010. The workgroup is expected to begin its work on April 15.

APA members have volunteered to work with OCSE in the coming months to enhance the form so that it provides clear

guidance for employers. For as long as the standardized income withholding order has been used, employers have received orders from private collection agencies, which are not entitled to use the form. Employers also receive orders from courts that direct payments away from SDUs, to recipients such as the custodial parent or a representative.

In addition to alleviating employers' administrative burden, the changes in the form are expected to improve child support collection overall. The problems stemming from misuse of the standardized form and the direction of payments to entities other than an SDU were apparent in the recent case involving Child Support Services of Atlanta. CSSA is alleged to have engaged in mail fraud to get parents to break their child support collection agreements with state authorities, then issuing the standardized IWO to the noncustodial parents' employers and directing payments to itself rather than to the SDUs (see "Inside Washington" for February). ■