

BUSINESS AND INDIVIDUAL TAX CHANGES IN THE 2010 HIRE ACT AND OTHER FAVORABLE TAX PROVISIONS

On March 18, 2010 President Obama signed H.R. 2847, carrying the Hiring Incentives to Restore Employment (HIRE) Act, into law. This special issue of *The Accountable Advisor* includes business and individual tax changes included in the Act and other favorable tax provisions.

Extension of enhanced small business expensing (Section 179). The new law gives a one-year lease on life to enhanced expensing rules, which allow qualifying businesses the option to currently deduct the cost of business machinery and equipment, instead of recovering it via depreciation over a number of years. For tax years beginning in 2010, the maximum amount that a business may expense is \$250,000, and the expensing election begins to phase out when a business buys more than \$800,000 of expensing-eligible assets. These dollar limits are the same as those that were in effect for 2008 and 2009.

Payroll tax holiday and up-to-\$1,000 credit for employers who hire unemployed workers. To help stimulate the hiring of workers by the private sector, the new law exempts any private-sector employer that hires a worker who had been unemployed for at least 60 days from having to pay the employer's 6.2% share of the Social Security payroll tax on that employee for the remainder of 2010. A company could save a maximum of \$6,621 if it hired an unemployed worker and paid that worker at least \$106,800—the maximum amount of wages subject to Social Security taxes—by the end of the year. As an additional incentive, for any qualifying worker hired under this initiative that the employer keeps on payroll for a continuous 52 weeks, the employer is eligible for an additional non-refundable tax credit of up to \$1,000 after the 52-week threshold is reached, to be taken on their 2011 tax return. In order to be eligible, the employee's pay in the second 26-week period must be at least 80% of the pay in the first 26-week period.

Workers hired after the date of introduction of the legislation (Feb. 3, 2010) are eligible for the payroll tax forgiveness and the retention bonus, but only wages paid after the date of the new law's enactment receive the exemption for payroll taxes.

Five-Year Carryback of NOLs Extended to Include 2009 NOLs and to Apply to Most Businesses. A net operating loss (NOL) is the excess of business deductions (computed with certain modifications) over gross income in a particular tax year. The loss can be deducted, through an NOL carryback or carryover, in another tax year in which gross income exceeds business deductions. In general, NOLs may be carried back two years and forward 20 years. The NOL is first carried back to the earliest tax year for which it's allowable as a carryback or a carryover, and is then carried to the next earliest tax year. A taxpayer may elect to forego the entire carryback period for an NOL and instead carry it forward.

Stimulus legislation passed earlier this year allowed eligible small businesses (with average annual gross receipts of \$15 million or less for 2006-2008) to elect to carry back NOLs from 2008 for 3, 4 or 5 years rather than the standard 2 years. A taxpayer with a fiscal year (i.e., other than a calendar year) was entitled to choose the extended carryback period for the tax year that began or ended in 2008.

New law. The 2009 Assistance Act provides an election for most taxpayers (not just small businesses) to increase the carryback period for an applicable NOL to 3, 4, or 5 years from 2 years. An applicable NOL means the taxpayer's NOL for any tax year ending after Dec. 31, 2007, and beginning before Jan. 1, 2010. A taxpayer with a fiscal year may effectively choose from among three taxable years, i.e., any taxable year beginning or ending in 2008 or 2009, as the loss year eligible for the extended carryback period.

Taxpayers electing a 5-year carryback can use the NOL to offset up to 50% of taxable income for the 5th tax year preceding the loss year, and 100% of taxable income in the remaining 4 carryback years. The amount of the NOL otherwise carried to tax years after the 5th preceding tax year is adjusted to take into account that the NOL could offset only 50% of the taxable income for the 5th year. That is to say, unlike previous versions of this proposal which were not included in the final legislation, there is no "haircut" for the amount by which the NOL is limited in the 5th preceding year.

In addition, the Act suspends the 90% limitation on the use of an NOL deduction for alternative minimum tax purposes, for alternative tax NOLs attributable to carrybacks for which the extended carryback is elected.

Generally, an extended carryback period election may be made for only one tax year. However, small businesses that have already elected an extended carryback for a 2008 NOL may also elect to extend the carryback for NOLs from 2009.

The election of an extended carryback period must be made by the due date (with extensions) for filing the tax return for the taxpayer's last tax year beginning in 2009. Once made, the election is irrevocable. If the taxpayer had previously elected to forego the carryback of an NOL from a tax year ending before Nov. 6, 2009, the taxpayer may revoke that election before the due date (including extensions) for filing the taxpayer's 2009 return.

The right to elect an extended carryback period does not apply to any taxpayer that has received or will receive financial assistance under the Emergency Economic Stabilization Act of 2008 in the form of an equity infusion or acquisition of a warrant (or other right).

Increased Penalty for Failure to File Partnership or S Corporation Returns. Under pre-Act law, the penalty for the failure to file a partnership or S corporation return is \$89 per partner or shareholder for each month or portion of a month the return is not filed, up to a maximum of 12 months. The Act increases the penalty to \$195 per month per shareholder or partner, effective for returns for tax years beginning after December 31, 2009.

Additional FUTA Surtax Is Extended Through June of 2011. The Act provides that the 6.2% FUTA tax rate continues to apply through June of 2011, and the 6.0% rate applies for the remainder of calendar year 2011 and for later years. That is, the temporary 0.2% surtax is extended for 1½ years through June 30 of 2011.

Corporate Estimated Tax Payments. The Act provides that for large corporations, the required payment of estimated tax otherwise due in July, August, or September of 2014 will be increased by 33%. The amount of the next required installment will be appropriately reduced to reflect the amount of the increase in the earlier installment. This will have the effect of accelerating government revenue for the affected fiscal year.

Extension of COBRA 65% subsidy. In 2009, Congress created a temporary 65% COBRA premium subsidy in response to a major recession that added millions to the unemployment rolls and would have left many without health insurance coverage because they couldn't afford to pay COBRA premiums on their own. The way the subsidy works is that, if a company has a group health plan that is subject to the Federal COBRA continuation coverage requirements or to similar requirements under State law, and the company receives a 35% payment from someone eligible for the subsidy, it must make the remaining 65% premium payment. The company is then "paid back," either by offsetting its payroll tax deposits or claiming the subsidy as an overpayment at the end of the payroll quarter. Eligible individuals can receive this subsidy for up to 15 months. However, under pre-Act law, to qualify for premium assistance, a worker had to be involuntarily terminated between Sept. 1, 2008 and Feb. 28, 2010. That meant that if there had not been an extension, workers involuntarily terminated after Feb. 28 wouldn't have been eligible for the COBRA subsidy. The new law extends the deadline for one month, so that workers who are involuntarily terminated between Sept. 1, 2008 and Mar. 31, 2010 are eligible for up to 15 months of COBRA subsidies. (I should also note that another bill currently being considered by the Senate would extend the 65% COBRA premium subsidy to apply for involuntary terminations through the end of 2010.)

For further information please contact Ron Ruggeri, CPA, 908.272.7000 or rruggeri@mspc-cpa.com.