

June 2010



Form to Claim Payroll Tax Exemption for Hiring New Workers Now Available

IRS WASHINGTON —The Internal Revenue Service has posted on its website the newly-revised payroll tax form that most eligible employers can use to claim the special payroll tax exemption that applies to many new workers hired during 2010.

Designed to encourage employers to hire and retain new workers, the payroll tax exemption and the related new hire retention credit were created by the Hiring Incentives to Restore Employment (HIRE) Act signed by President Obama on March 18.

Employers who hire unemployed workers this year (after Feb. 3, 2010, and before Jan. 1, 2011) may qualify for a 6.2-percent payroll tax incentive, in effect exempting them from the employer's share of Social Security tax on wages paid to these workers after March 18. This reduction will have no effect on the employee's future Social Security benefits. The employee's 6.2 percent share of Social Security tax and the employer and employee's shares of Medicare tax still apply to all wages.

In addition, for each qualified employee retained for at least a year whose wages did not significantly decrease in the second half of the year, businesses may claim a new hire retention credit of up to \$1,000 per worker on their income tax return. Further details on both the tax credit and the payroll tax exemption can be found in a recently-expanded list of answers to [frequently-asked questions](#) about the new law now posted on IRS.gov.

How to Claim the Payroll Tax Exemption

[Form 941](#), Employer's QUARTERLY Federal Tax Return, revised for use beginning with the second calendar quarter of 2010, will be filed by most employers claiming the payroll tax exemption for wages paid to qualified employees. The HIRE Act does not allow employers to claim the exemption for wages

paid in the first quarter but provides for a credit in the second quarter. The [instructions](#) for the new Form 941 explain how this credit for wages paid from March 19 through March 31 can be claimed on the second quarter return. The form and instructions are now available for download on IRS.gov.

The HIRE Act requires that employers get a signed statement from each eligible new hire, certifying under penalties of perjury, that he or she was not employed for more than 40 hours during the 60 days before beginning employment with that employer. Employers can use new [Form W-11](#), Hiring Incentives to Restore Employment (HIRE) Act Employee Affidavit, released last month, to meet this requirement. Though employers need this certification to claim both the payroll tax exemption and the new hire retention credit, they do not file these statements with the IRS. Instead, they must retain them along with other payroll and income tax records.

These two tax benefits are especially helpful to employers who are adding positions to their payrolls. New hires filling existing positions also qualify as long as they are replacing workers who left voluntarily or who were terminated for cause and otherwise are qualified employees. Family members and other relatives do not qualify for either of these tax benefits.

Businesses, agricultural employers, tax-exempt organizations, tribal governments and public colleges and universities all qualify to claim the payroll tax exemption for eligible newly-hired employees. Household employers and federal, state and local government employers, other than public colleges and universities, are not eligible.

Poster Requirement for Federal Contractors and Subcontractors

Effective June 21, 2010 federal contractors and subcontractors must post this notice. The new federal labor law notice includes employee's rights under the NLRA, lists actions considered illegal by employers, and unions, as well as, where to go for questions about the law. Contact us to get your poster.

Employee Leasing – the Temporary Work Force of the Future

The changing face of the American workplace begs the question "what is an employee". Companies regularly turn to temporary staffing/leasing firms to provide employees for their short-term and peak requirements.

While employee leasing offers greater staffing flexibility, fewer administrative burdens, and often lower costs, the once common notion of reduced legal exposure from leased workers has given way to uncertainty and confusion.

Companies using temporary workers should examine several areas where they may face significant potential liability.

Joint or Co-employment Status

The legal relationship between you, the employee and the leasing/temp agency is murky at best. Various laws impose the obligations of an "employer" on a company whenever the facts and circumstances establish a significant connection with a worker.

Temp/leasing agencies and their customers often have sufficient contact with the temp/leased worker so that both will be viewed as "employers" with certain legal obligations. Although the temp firm usually pays the workers, withholds and pays taxes, provides workers' compensation coverage and has the ultimate right to hire and fire, the customer (you) often supervise and direct the worker's daily tasks, control the working conditions, and determine the length of the assignment.

In many temp/leased employee arrangements, a "joint employer" or "co-employer" relationship exists. The existence of this joint employer relationship puts a new slant on many of the legal issues that face all employers and the courts and regulatory agencies have provided some surprising results.

Discrimination

A recent court ruling in New York found the employer who used a temp agency to fill a temporary position was guilty of discrimination because he discharged her and failed to hire her on a permanent basis because of her race, sex and national origin. This case clearly establishes that customers can be held accountable for unlawful discrimination against a temporary/leased firm's employees.

The Americans with Disabilities Act

The Americans with Disabilities Act establishes a similar degree of accountability. The same ADA provisions which prohibit employers from discriminating against their disabled applicants or employees also protect a temp/leased employee from discrimination by a customer. And while the ADA does not specifically address a customer's obligation to accommodate a disabled worker, the EEOC's enforcement of other civil rights laws leaves little doubt that customers who discriminate against a temp firm's employee risk liability under the ADA and may be required to make reasonable accommodations for their temp employees as well as for their own workers. Although the ADA is silent as to who bears the burden of providing reasonable accommodations, most courts have found that the customer, not the temp/leasing agency, is better suited to make the accommodations.

Wage and Hour

Because of this "co-employment" relationship, courts can hold the **customer** partially liable for penalties and fines if a temp employee works more than 40 hours in a week and the temp/leasing agency fails to pay the temp employee his/her overtime pay.

Family and Medical Leave Act

A customer who employs 45 regular full-time workers, but is found to be a joint employer of 10 temporary employees assigned by a temp/leasing firm, would be covered under the FMLA because the customer will be deemed to have 50 or more employees.

The regulations make it clear that the temporary staffing firm generally is considered the "primary" employer of the temps and therefore, is responsible for giving them the required notices, providing leave, maintaining health benefits and job restoration.

Recommendations

1. It is critical for all companies who utilize temps/leased employees to read and examine carefully the leasing agreement with the temp/leasing firm. Ensure that the leasing agreement contains a broad indemnification clause in which the temp/leasing firm agrees to hold the customer harmless for all employment related liability arising from the leased workers. The indemnification clause also should provide for the payment of costs and attorneys' fee incurred by the customer should it be sued over a matter within the scope of the indemnification.
2. Check your general liability insurance for coverage related to leased employees and make certain that your policies prohibiting harassment and discrimination are given to all your regular employees and your temp/leased employees.

Conclusion

The use of temp/leased workers provides many advantages for a company's short-term business needs including the flexibility of a supplemental work force and the ability to protect regular full-time employees from layoffs. However, the "co-employment" doctrine can create additional unexpected liability. Remember, in a lawsuit, the injured party will put as many defendants' names on the paperwork as he/she can and if he/she thinks your company has deep pockets, you

will undoubtedly see your company's name listed as a defendant.

Employee Misclassification Bill Proposes Changes to FLSA

Employers who misclassify their employees as non-employees should be aware of a proposed bill. The bill, if accepted, requires companies to accurately record non-employees, such as independent contractors. Penalties for misclassifying regular employees are included in the bill.

The Employee Misclassification Prevention Act, amends recordkeeping and notice requirements under the FLSA. Employers must maintain accurate records of all workers, employees and non-employees such as independent contractors. Those records would include hours worked, payment, and classification of each worker.

This bill includes a provision for employers to give notices to all of their workers, employees and non-employees, upon hire or if there was any change of the employee's classification status. The written notices include:

- Informing the worker of their exemption status classification
- Advise on locating the Department of Labor (DOL) website for further information
- Contact information to that local DOL office
- Information to non-employees regarding their rights

Some States have already enacted laws on this nature. It appears as if the purpose of this requirement is to assist the DOL in computing the overtime rate due to employees and make employers classify their employees properly. The bill would prohibit organizations from firing or discriminating against any worker, employee or non-employee, for filing a complaint, testifying in a hearing, or serving on an industry committee regarding misclassification practices.

The language of the Special Penalty for Certain Misclassification, Recordkeeping, and Notice Violations-Section 16 of the FLSA would be changed to include "individuals" in addition to employees. In addition, civil penalties for misclassification practices would be increased to up to \$1,100 per worker, and up to \$5,000 per worker for willful repeat violations.

Further, the bill promotes inter-department communication by having various departments receiving complaints report the information to the Wage and Hour Division (WHD), who then

may refer to the Internal Revenue Service (IRS).

The act would also allow the WHD to target employers for auditing purposes if they are in industry with a history of misclassifying employees. The bill was referred to the Committee on Education and Labor and the Committee on Ways and Means for review.

The entire bill, [H.R. 5107](#), is available online at the Library of Congress website.

These articles should not be construed as legal advice or as pertaining to specific situations. Consult with your legal counsel for further information.

Stay “in the know” in 2010 –

Educational Seminars

We have a variety of educational seminars planned for 2010. Most will be held at the office of our partner in Campbell:

Leavitt Pacific Insurance Brokers
695 Campbell Technology Parkway, Ste 250
Campbell, CA 95008

June Educational Session

Immigration Update and e-verify

An authority on legal ethics, Ms. Younossi is an accomplished speaker and trainer, providing high-level training on immigration matters and the California Rules of Professional Conduct. She has developed and presented numerous immigration law training seminars for in-house counsel, human resource professionals and staffing departments, as well as training for the legal staff, associates and partners at her prior firm.

[Register](#)

Agenda:

- H1B Cap: Plenty of H-1B numbers, and even more government scrutiny!
- Layoffs, financials and permanent residence options.
- E-verify System: The good, the bad, and the options.
- No Match rules: To act or not to act?

- Immigration 2010: What is ahead and how to prepare for it

OHR’s quarterly Harassment Prevention Training for Managers

As a service to your business we have a quarterly Harassment Prevention Training. Those sessions occur each quarter on the last Thursday of the month at 1:00 PM. Mark your calendars for March, June, September and December. We also do individual sessions for your offices, including Managers and Supervisors and non supervisory employees.

The next OHR Harassment Prevention Training for Managers session is scheduled for June 24th at 1:00 pm in Campbell, CA. To register please RSVP to [Harassment Prevention Training](#)

MyOHR provides key Human Resources consulting and support for small, emerging and mid-size companies. Focusing on Human Resource Legal Compliance, MyOHR assists business in achieving operational efficiency by providing the infrastructure necessary to manage the workforce in compliance with State and Federal requirements. MyOHR is cost effective for companies that have not budgeted for a full-time HR position. Contact Jaime Orendac, SPHR-CA at Jaimeo@MyOHR.com.