Hiring Incentives to Restore Employment Act (HIRE), Pub. L. No. 111-147, Signed Into Law

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Although public attention has been focused heavily on incentives in the legislation for hiring and retaining unemployed workers, the Hiring Incentives to Restore Employment Act, which was signed into law on March 18, 2010, also contains several other significant provisions including continuing the 2008 and 2009 levels of expense method depreciation for 2010; several transportation-related provisions; a number of offset provisions that tighten the rules applicable to foreign accounts, foreign assets generally and disclosure provisions; and a provision increasing estimated tax payments for large corporations.

**Expense method depreciation**

The maximum allowable amount of expense method depreciation, which was scheduled to drop from $250,000 to $134,000 (inflation-adjusted up from $125,000) in 2010 was continued by the legislation for 2010 (for taxable years beginning before 2011) at the $250,000 level. The phase-out amount was also continued at the 2008 and 2009 level of $800,000 through 2010. The phase-out would otherwise have been in effect for 2010 at the $500,000 level. The new legislation also left in place the permanent level of phase-out of $200,000 but with an increase to $800,000 for 2007 through 2010.

Further, the 2010 legislation repealed the provisions pertaining to inflation adjustments for expense method depreciation allowances. That provision had been in federal tax law since 2002. The repeal means that, if the expense method depreciation allowance drops to $25,000 in 2011, as is now scheduled, there would be no inflation adjustment for 2011 or later years unless Congress amends the provision further. The legislation did not extend so-called “bonus” depreciation into 2010. Off the shelf computer software was already eligible for expense method depreciation if placed in service before 2011. The amendments to Section 179 are effective for taxable years beginning after December 31, 2009 and before 2011.

The legislation did not address the issue of late elections or late revocations for expense method depreciation purposes. Late revocations can be made under current law through 2010 by the taxpayer with respect to any property without IRS consent provided the period for filing the amended return has not expired. Once made, the election to revoke is irrevocable. However, the situation with late elections is markedly different. In 2005, the Department of the Treasury issued regulations confirming the right to elect (and to...
revoke) without Commissioner consent after 2005 and before 2008. The right to elect on an amended return was not extended through 2010 as was done for revocations. The statute clearly states that “such election shall be made in such manner as the Secretary may by regulations prescribe.” In late August of 2008, IRS issued a Revenue Procedure indicating that the Department of the Treasury “intended” to amend the regulations to allow late section 179 elections without Commissioner consent for taxable years after 2007 and before 2010. It is clear that the Congressional directive is that the Department of the Treasury (not IRS) can specify the manner in which elections may be made. Even the IRS guidance (which did not comport with the authority given the Treasury by the Congress) has expired. Therefore, it would appear that nothing which can be relied upon authorizes late elections in 2010 and the new legislation did nothing to change the situation. Moreover, the Department of the Treasury has done nothing to issue regulations allowing late elections without Commissioner consent after 2007 and before 2011, either. As noted, except for the Congress, only the Department of the Treasury in regulations can authorize late elections without Commissioner consent. Therefore, late elections without Commissioner consent continue to be out of reach through 2010 unless regulations allowing such elections are promulgated or Congress amends the statute.

Employment-related provisions

The legislation signed on March 18, 2010, as noted above, was driven heavily by a desire to encourage employers to add additional employees. One provision forgives payroll taxes for individuals employed after March 18, 2010, through December 31, 2010. Eligible employees must have begun employment after February 3, 2010 and before January 1, 2011, have not been employed for more than 40 hours during the 60-day period ending on the date of employment and were not employed to replace another employee for the employer unless the other employee separated from employment voluntarily or for cause. Most private sector employers are eligible (including colleges and universities) but governments at all levels are not considered eligible employers.

The new legislation also contains a business credit for retention of newly-hired individuals in 2010. The current year business credit is increased, for each retained worker, by the lesser of $1,000 or 6.2 percent of the wages paid by the taxpayer to the retained worker during the 52 consecutive week period. A “retained worker” is any qualified individual who was employed by the taxpayer on any date during the taxable year, who was so employed for a period of not less than 52 consecutive weeks and whose wages for such employment during the last 26 weeks of the period equaled at least 80 percent of such wages for the first 26 weeks of the period. Qualified individuals are defined in terms of the eligibility rules for forgiveness of payroll taxes.

Payment of corporate estimated taxes

The 2010 legislation, in an effort to offset outlays elsewhere in the bill, increases the payment of estimated taxes by corporations with assets of not less than $1,000,000,000, determined as of the end of the preceding taxable year.
The Health Care and Education Reconciliation Act of 2010,\(^4\) one of the most debated and discussed items of legislation in modern
time, was set to become law as the Agricultural Law Digest went
to press. The Patient Protection and Affordable Care Act\(^2\) was
passed by the House of Representatives on Sunday, March 21,
2010, along with H.R. 4872 which was drafted to make “fixes”
to the main bill. The President signed the Patient Protection and
Affordable Care Act on March 23. The Senate took up the
Reconciliation Act provision on March 24 and stripped out two
minor provisions (pertaining to technical corrections dealing with
Pell Grants for low-income students) before that bill was passed.
Because of the amendments, that bill had to return to the House
where it was approved a second time by a 220 to 207 vote margin
and sent on to the President for signature.

We anticipate an article in the next issue of the Digest on the new
legislation with only a couple of provisions mentioned here.

**In the Medicare Hospital Insurance Tax**

One of the revenue offsets in the bill is an increase in the Hospital
Insurance (HI) tax on couples filing a joint return or a surviving
spouse who earn more than $250,000 ($125,000 for married
taxpayers filing separately) and $200,000 for other taxpayers.\(^5\)
The tax is imposed at a rate of 3.8 percent of the lesser of the
taxpayer’s “net investment income” or the excess (if any) over
the modified adjusted gross income for the taxable year over the
threshold amount.\(^4\) The threshold amounts are the above figures
based on filing status.

“Net investment income” is defined as the excess of the sum
of gross income from interest, dividends, annuities, royalties and
rents, other than such income derived in the ordinary course of
a trade or business; other gross income derived from a trade or
business which is a passive activity\(^5\) or a trade or business of
trading in financial instruments or commodities; and net gain
attributable to the disposition of property other than property held
in a trade or business which is not a passive activity or an activity.\(^5\)
The term also includes gain from the disposition of an interest in a
partnership or S corporation but only to the extent of the net gain
which would be taken into account by the transferor if all property
of the partnership or S corporation were sold for fair market value
immediately before the disposition of such interest.\(^7\) The term “net
investment income” does not include distributions from qualified
plans.\(^8\)

The new tax applies to trusts and estates at the same rate, based
on the lesser of the undistributed net investment income for the
taxable year or the excess of the adjusted gross income over the
dollar amount at which the highest tax bracket begins for the
taxable year.\(^9\)

**Effective date**

The provision is effective for taxable years beginning after
December 31, 2012.\(^10\)

**Student loan reform**

The legislation makes major changes in the student loan program
with termination of the authority of participating institutions to
make or insure new loans.\(^11\) Student loans will be made directly
from the federal government with what has been calculated as
producing a substantial saving.

**Other provisions**

The next issue of the Digest will discuss other major provisions
of the massive legislation including additional tax provisions with
coverage of credits for small business owners providing insurance
coverage and other important features of the bill.

**ENDNOTES**

3. Health Care and Education Reconciliation Act of 2010, H.R.
4. Id., § 1411(a)(1).
5. See I.R.C. § 469.
8. Id., § 1411(c)(5).
9. Id., § 1411(a)(2).
10. Id., § 1411(e)(4).

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**CASES, REGULATIONS AND STATUTES**

by Robert P. Achenbach, Jr

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**FEDERAL ESTATE AND GIFT TAXATION**

**GENERATION SKIPPING TRANSFERS.** The grantors
had established three pre-September 25, 1985 trusts for three
children. The trusts provided that, at the death of the last child, the
trusts’ assets were to be distributed to the remainder holders, the
grandchildren. The trustee obtained court permission to separate
and consolidate the trusts into trusts for each child and to change
the distribution time to provide that, at the death of each child,
the trust assets were to be distributed to the remainder holders.
The IRS ruled that the separation and consolidation of the trusts
and the change in distribution timing did not subject the trusts to
GSTT. Ltr. Rul. 201011002, Nov. 6, 2009; Ltr. Rul. 201011002,
Nov. 6, 2009.

**GIFTS.** The taxpayers, husband and wife, transferred partial
interests in an LLC to their children. The LLC’s principal asset
was a parcel of undeveloped land. The LLC operating agreement
provided for distributions of capital but only under the authority
and discretion of a manager. The LLC members had a right to
transfer their interests but subject to a right of first refusal by the