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ACTION

The Senate has passed H.R. 2847, the Hiring Incentives to Restore Employment Act. (Yes, this is one of those bills when the Senate takes a House-passed bill on another issue and strips everything out of it.) It includes a modest jobs tax credit, a temporary extension of the increase in the amount a business can write off in the year of purchase of equipment, some help for highway infrastructure spending, and an expansion of the "Build America" bond program. The bill now goes to the House. The most recent indication is the House will pass a bill this week. There are a couple of issues that need to be resolved so it is not entirely clear whether another round of ping-pong between the House and Senate will be necessary. However, it looks as if this will be law by the middle of this month and I do not think the jobs tax credit or the direct expensing allowance aspects will change.

The jobs tax credit is actually a temporary combination new-hire payroll tax reduction/job retention credit. The payroll tax reduction is based on hiring someone who has been unemployed for at least 60 days. The individual has to "certify by signed affidavit, under penalties of perjury, that such individual has not been employed for more than 40 hours during the 60-day period ending on the date such individual begins such employment." The employer would not have to pay the employer share of the social security component (6.2 percent of wages) of Federal Income Contributions Act (FICA) taxes for that individual. In addition, if the employer retains newly hired employees that meet the qualifications of the law for at least 52 weeks and the individual's wages for such employment during the last 26 weeks of such period equaled at least 80 percent of such wages for the first 26 weeks of such period, the employer is entitled to a one-time $1,000 tax credit for each such employee. While few employers would add a new employee just because of the credit, it is tax relief and since part of it is payroll tax-related, the relief is immediate. (PS. Trade associations qualify for the incentives.)

The direct expensing allowance provision is often referred to by its tax code section, "Section 179." H.R. 2847 would increase for the rest of this year the amount that can be written off in the first year to $250,000. The amount is currently $125,000, indexed for inflation. The bill also increases the investment cap in Section 179. It is currently $500,000 indexed for inflation and the bill pushes it back up to $800,000 for the year.

Senate Majority Leader Harry Reid (D-NV) says he will bring the rest of the bi-partisan bill that Senators Max Baucus (D-MT) and Charles Grassley (R-IA) had developed and from which the Majority Leader had spliced out the four items in H.R. 2847. The bill includes dozens of one year extensions of expiring or expired tax relief ranging from the Research and Development Credit to retailer accelerated depreciation for building improvements.

PENSION INVESTMENT ADVICE

The Pension Protection Act of 2006 (PPA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to create a new statutory exemption from the prohibited transaction rules to expand the availability of investment advice to participants in 401(k)-type plans and individual retirement accounts (IRAs). The Department of Labor (DOL) has published a proposed rule to implement these PPA provisions.

At the time the law was passed, investment advice given by an investment adviser to plan participants on investments that pay additional fees to the adviser or its affiliates can violate the prohibited transaction rules of ERISA and the Internal Revenue Code. This has limited the types of investment advice arrangements available to participants in 401(k) plans and IRAs. Comments are due by May 5, 2010. (The Department of Labor had published a final rule on January 21, 2009 and withdrew that final rule in November, 2009. The view was that the earlier version of the rule did not provide adequate protections for the employees and allowed for conflicts of interest among the advisers.)

The proposed regulation allows investment advice to be given under the statutory exemption in two ways. One is through the use of a computer model certified as unbiased. The other way is through an adviser compensated on a "level-fee" basis (i.e., fees do not vary based on investments selected by the participant). Several other requirements also must be satisfied, including disclosure of fees the adviser is to receive. The regulation contains some key safeguards and conditions, including:

•Requiring that a plan fiduciary (independent of the investment adviser or its affiliates) select the computer model or fee leveling investment advice arrangement.

•Imposing recordkeeping requirements for investment advisers relying on the exemption for computer model or fee leveling advice arrangements.

•Requiring that computer models must be certified in advance as unbiased and meeting the exemption's requirements by an independent expert.

•Establishing qualifications and a selection process for the investment expert who must perform the above certification.

•Clarifying that the fee-leveling requirements do not permit investment advisers (including its employees) to receive compensation from affiliates on the basis of their recommendations.

•Establishing an annual audit of investment advice arrangements, including the requirement that the auditor be independent from the investment advice provider.

•Requiring disclosures by advisers to plan participants.