SMALL BUSINESS LEGISLATIVE COUNCIL

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WHBAA

On Friday, November 6, 2009, the President signed the Worker, Homeownership, and Business Assistance Act of 2009 into law. In addition to extended unemployment benefits, the new law extends and expands the temporary first time homebuyer's tax credit and the temporary Net Operating Loss (NOL) carryback relief. The bill also extends a temporary FUTA surtax and increases a failure to file penalty for partnership and S Corporation entity level returns.

Earlier this year, the American Recovery and Reinvestment Act of 2009 extended the net operating loss carryback period from two to five years for tax years beginning in or ending in 2008 for small businesses with gross receipts of $15 million or less.

The new law allows all businesses to carry back net operating losses for up to five years for losses incurred either in 2008 or 2009, but not both (at the election of the taxpayer). Businesses will be able to offset 50 percent of the available income from the fifth year and 100 percent of all income in the remaining four carryback years. The two positives for small business is if you were fortunate enough not to have an NOL for 2008, but the economy caught up with your business in 2009 you can use the additional years. The second positive is that our understanding of the new law is that small businesses as defined by the provision that have already elected to carry back 2008 under the American Recovery and Reinvestment Act may also elect to carry back losses from 2009.

The new law extends the availability of the first time homebuyer credit to homes under a binding contract before April 30, 2010, allowing 60 days to close. In addition, the credit will now phase out for individuals with income above $125,000 and for joint filers with income about $225,000. A $6,500 credit will be available to homebuyers who have been in their current residence for the last five years or more. The credits will be available only for the purchase of principal residences with a purchase price of $800,000 or less.

A FUTA surtax of 0.2 percent of wages up to $7,000 per employee was scheduled to expire at the end of this year. It has been extended through June, 2011.

HEALTH

The ball is now in Senate Majority Leader Harry Reid's (D-NV) court. The House has passed its version of health care reform. Among the notable provisions, the House bill includes the Form 1099 "pay-go" revenue offset upon which we have reported many times. This is the provision that would require all businesses to issue Forms 1099 to all of their vendors (corporate and non-corporate entities) that provide services or provide "property," if the business pays more than $600 annually for those services or property. The current Form 1099 law requires the issuance of Forms 1099 only to individuals who provide services. This new requirement would take effect in 2012.

The House bill includes a "play or pay" penalty for not providing health care benefits to employees and dependents. The requirement takes effect in 2013. The penalty structure is as follows:

Wages do not exceed $500,000 - 0 percent
Wages exceed $500,000, but do not exceed $585,000 - 2 percent
Wages exceed $585,000, but do not exceed $670,000 - 4 percent
Wages exceed $670,000, but do not exceed $750,000 - 6 percent
Wages exceed $750,000 - 8 percent

The bill does require individuals to obtain coverage if not provided by an employer. The penalty for failing to do so is 2.5 percent of income with a penalty cap based on the cost of obtaining coverage.

The House bill also includes a surtax on high incomes. Since it is part of the personal rate structure, it has an impact on sole proprietors, partners and S Corporation shareholders. The surtax begins at $500,000 in income for individuals and $1 million for joint filers. The tax is a flat 5.4 percent on those incomes. No surprise that this provision goes into effect a bit earlier - in 2011.

The intersection of unknown and unintended is where the individual mandate meets the small business exemption. Will that be a pressure point to provide coverage anyway?

Other speed bumps. What will happened to smaller business that do currently provide coverage but are more likely to have coverage that will not meet the government's not-yet specified standards? Do you move upward to meet the standard, or take the penalty? In that case you have the employee pressure too as they are then exposed the individual mandate. Larger firms are more likely beneficiaries of the proposal. Will their plans follow gravity down to the levels that meet the government specified standards?

RED FLAG RULES

The Federal Trade Commission (FTC) is delaying enforcement of the "Red Flags" Rule until June 1, 2010, for financial institutions and creditors subject to enforcement by the FTC.

The rule was promulgated under the Fair and Accurate Credit Transactions Act under which the FTC was required to develop regulations requiring "creditors" and "financial institutions" to address the risk of identity theft. The resulting Red Flags Rule required businesses that have "covered accounts" to develop and implement written identity theft prevention programs to help identify, detect, and respond to patterns, practices, or specific activities – known as "red flags" – that could indicate identity theft.

The problem was that the FTC took a very broad view of what constitutes a "creditor." In the view of the FTC this includes businesses or organizations that regularly provide goods or services first and allow customers to pay later as well as covering businesses or organizations that regularly grant loans, arrange for loans or the extension of credit, or make credit decisions. Even lawyers were considered to be creditors by the FTC and being the resourceful folks they are, the lawyers went to court and got a court to agree that it should not apply to them. The FTC is considering its appeal options but in the meantime, given the general hue and cry about the Red Flag Rule, it is postponing compliance for everyone. The Red Flag Rule was to have gone into effect on November 1st.

EEOC POSTER

The Equal Employment Opportunity Commission (EEOC) EEOC has revised its "Equal Employment Opportunity is the Law" poster. This new version reflects current federal employment discrimination law (including the Americans with Disabilities Act Amendments Act of 2008). The poster was revised to add information about the Genetic Information Nondiscrimination Act of 2008, which is effective November 21, 2009. Employers can obtain free versions by going to http://www1.eeoc.gov/employers/poster.cfm

The genetic information discrimination claims are covered by the same basic equal opportunity provisions that cover race, color, national origin, sex, religion, or disability. A business is covered by theses laws if it has 15 or more employees who worked for the employer for at least twenty calendar weeks (in this year or last.