



Small Business Update: The American Recovery and Reinvestment Act of 2009 and The Fair Labor Standards Act

C. JASON WILLCOX

MOORE, CLARKE, DuVALL & RODGERS, PC

Albany • Valdosta • Atlanta



Overview

- ARRA of 2009

- FLSA



American Recovery and Reinvestment Act (ARRA) of 2009

- The ARRA is otherwise known as the Recovery Act.
- Authorizes \$787 billion in government spending, incentives, and tax cuts
- Enacted with the intention of creating or saving three to four million jobs in the next two years
- The current administration expects to have 75% of the money committed by September 2010 and 91% committed by Sept 2011.



What areas of my small business will be affected by the ARRA?

- Making Work Pay Tax Credit
- COBRA Contribution Subsidy
- Net Operating Loss (NOL) Extended Carryback
- Increased Deductions for Tangible Property
- Bonus Depreciation
- Small Business Association Loans



Making Work Pay Tax Credit

- One of the largest features of the Recovery Act is a tax credit for working individuals for 2009 and 2010.
- The Making Work Pay provision of the Recovery Act will provide a refundable tax credit of up to \$400 for working individuals and up to \$800 for married taxpayers filing joint returns.



Making Work Pay Tax Credit

- For employees, the credit is implemented by a change in wage withholding so employees can keep more of their wages throughout the year.
- From an employer perspective, this means adjusting wage withholding according to new IRS tables.
- These new wage adjustments were required to be implemented on or before April 1, 2009



Making Work Pay Tax Credit

- The two main methods of computation of the wage withholding are the Wage Bracket Method and the Percentage Method.



Making Work Pay

- Employees do not need to prepare and submit new W-4.
- The new tables prescribed by the Department of Treasury reflect the Making Work Pay credit.



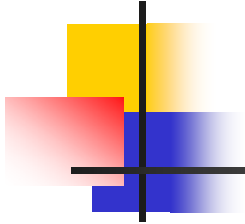
Making Work Pay

- The Making Work Pay provision will provide refundable tax credits for tax years 2009 and 2010
- The changes were designed to increase the new, take home pay, for employees
- Persons that receive a paycheck and are subject to income tax withholding will receive automatic reduction of income tax when the new tables are implemented



Making Work Pay

- Tax credit will be phased out for individuals earning in excess of \$75,000 and for joint filers earning in excess of \$150,000.
- If a taxpayer does not have taxes withheld, an individual can claim the credit on the tax return.



COBRA Contribution Subsidy



What is COBRA?

- Title X of The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 requires employers with group health plans to offer “qualified beneficiaries” the opportunity to continue temporarily their group health care coverage under their employer’s plan if their coverage otherwise would cease due to a “qualifying event.”
- **Prior** to the enactment of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”), the continued coverage was available solely on an employee self-pay basis.



Plans Subject to COBRA

- **In summary if an employer:**
 - Offers a group health plan; and
 - Employs 20 or more people
- **The employer is subject to COBRA regulations.**



COBRA - Qualified Beneficiary

- COBRA defines a qualified beneficiary as any person covered under the group plan the day before any qualifying event.
- Which Can include:
 - A covered employee;
 - The spouse of a covered employee;
 - A dependent child of a covered employee; or
 - A child born to or placed for adoption with a covered employee during the period of continued COBRA coverage.



COBRA – Qualifying Events

- Voluntary or involuntary termination of employment for reasons other than gross misconduct;
- Reduction in the number of hours of employment for the covered employee;
- Covered employee's becoming entitled to Medicare
- Divorce or legal separation of the covered employee
- Death of the covered employee; or
- Loss of dependent child status under the plan rules



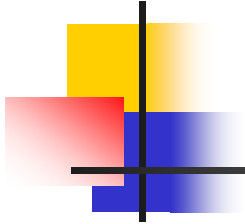
COBRA Contribution Subsidy

- The Federal Government will pay up to 65% of COBRA health insurance premiums for assistance eligible individuals.
- An assistance eligible individual is an employee or a member of the employee's family who: as a result of the employee's involuntary termination (for reasons other than gross misconduct) at any time from Sept. 1, 2008 through December 31, 2009, is eligible for COBRA during that period, and elects COBRA coverage .



The ARRA and COBRA

- Eligible individuals pay only 35% of their COBRA premiums for periods of coverage beginning on or after February 17, 2009 (March 1, 2009 for plans charging for coverage on a calendar month basis) for up to 9 months or until the maximum period for COBRA coverage ends, whichever occurs first.
- The remaining 65% of the premium is reimbursed to the employer (or other responsible entity) as a credit on its IRS form 941 quarterly employment tax return.



Net Operating Loss (NOL) Carryback



Net Operating Loss (NOL) Carryback

- Before the ARRA, businesses were able carryback NOLs for two years or carry NOLs forward for 20 years.
- This allows businesses to use its losses in one year to offset its tax burden in another year.



Net Operating Loss Carryback

- The ARRA extends the NOL carryback for eligible small businesses from two to five years.
- The Joint committee on Taxation expects this will increase liquidity in small businesses by \$4.7 billion.



What Qualifies as an Eligible Small Business (ESB)?

- An ESB is a sole proprietorship, partnership, or S corporation that has average annual gross receipts (reduced by returns and allowances) of \$15 million or less during the 3-year period ending with the tax year of the NOL.



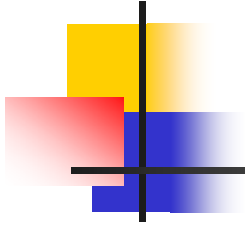
Net Operating Loss (NOL) Carryback

- The 5-year NOL carry-back option is available as a one-time only irrevocable election and may only be made with respect to one fiscal year. A calendar year taxpayer can elect only for 2008. A fiscal-year taxpayer whose year ends in 2008 can elect either for its fiscal year ending in 2008 or its fiscal year beginning in 2008 and ending in 2009.
- The company can choose to carry-back losses two, three, four or five years.

Deadlines for Carryback Option



- The appropriate form must be filed on or before the later of the date that is six months after the due date (excluding extensions) for filing the taxpayer's return for the taxable year of the applicable 2008 NOL or April 17, 2009.
- A calendar-year corporation that qualifies as an Eligible Small Business (ESB) must file a claim by Sept. 15, 2009.
- Deadlines vary for fiscal-year taxpayers, depending upon when their fiscal year ends and whether they are making the choice for the tax year that ends or begins in 2008.



Increased Deductions for Tangible Property



Increased Deductions for Tangible Property

- Section 179 of the Internal Revenue Code allows deductions for the cost of certain tangible property used in your trade or business.
- The ARRA amended Section 179 to allow small businesses to deduct up to \$250,000 of the cost of qualifying property placed in service during 2009.



Increased Deductions for Tangible Property

- The \$250,000 limit is reduced by the amount by which the cost of Section 179 property placed in service in the tax year exceeds \$800,000.
- Without the ARRA the \$250,000 limit would have dropped to \$133,000!
 - This increased deduction can reduce taxable income by \$117,000.



What Property Qualifies for the Increased Deduction

- Property acquired *by purchase* for use in your trade or business
 - This shall not include investment property, rental property, and property that produces royalties.
 - The property must be certain types of depreciable property.

Section 179 Depreciable Property



- Tangible personal property
- Other tangible property used as
 - an integral part of manufacturing, production, or of furnishing transportation, communications, electricity, gas, water, or sewage disposal services
 - a research facility used in connection with any of the activities above
 - a facility used in connection with any of the activities for the bulk storage of fungible commodities
- Single purpose Agricultural or horticultural services
- Storage facilities used in connection with distributing petroleum
- Off-the-shelf computer software



Bonus Depreciation

- The bonus depreciation provision of the ARRA enables businesses to deduct half the costs of qualifying property in the year it is placed in service.
- The allowance is an additional deduction of 50% of the property's depreciable basis (after the aforementioned Section 179 deductions!)



Qualifying Property

- Tangible property depreciated under modified accelerated cost recovery system (MACRS) with a recovery period of 20 years or less.
- Water utility property.
- Off-the-shelf computer software.
- Qualified leasehold improvement property.



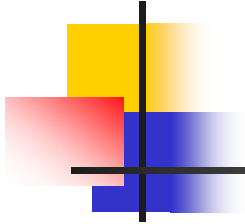
Qualifying Property

- The property must also meet the following tests:
 - The property must be acquired after December 31, 2007 and before January 1, 2009.
 - The property must be placed in service before January 01, 2010.
 - The original use of property must begin with the person claiming the deduction after December 31, 2007.



Some Property Will Not Qualify

- Property placed in service and disposed of in the same tax year.
- Property converted from business to personal use in the same tax year.
- Property required to be depreciated under Alternative depreciation System (ADS).
- Certain restaurant and retail improvement property placed in service after December 31, 2008.



Increasing Funds Available from Lenders Through Increased Guarantees and Reduced Fees



Increased Guarantees

- The U.S. Small Business Administration (SBA) currently guarantees certain loans made to borrowers who cannot find credit elsewhere.
- Those guarantees range from 85% for loans at or below \$150,000 and up to 75% of larger loans.
- In times of economic hardship those guarantees are still not large enough to give banks the confidence they need to lend.
- As a result, while the SBA typically guarantees about \$20 billion in loans annually. As of March 2009, new lending was trending below \$10 billion this year.



Increased Guarantees

- The ARRA allows any lender who participates in the SBA loan program, to request a guarantee of up to 90% for each eligible loan.
- The hope is that these higher loan guarantees will provide banks with the greater confidence they need to extend credit to small businesses during trying economic times.



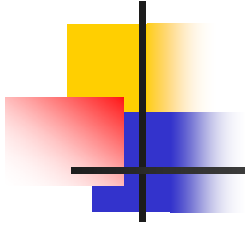
Eliminate SBA Loan Fees

- In addition to increasing guarantees, the ARRA temporarily eliminates Certified Development Company processing fees charged to borrowers of certain eligible SBA loans.
- Likewise, certain up-front fees passed from lenders to borrowers, which can go as high as 3.75 percent, will be temporarily eliminated.



SBA Recovery Efforts Impact to Date

- Since the signing of the ARRA weekly loan dollar value has risen over 70% in certain SBA loans.
- From February 17, 2009 to September 30, 2009, more than 1,260 lenders that had not made a loan since October 2008 have made SBA guaranteed loans.



Fair Labor Standards Act (FLSA)



Overview

- The Fair Labor Standards Act (FLSA) was enacted in 1938. It set standards for child labor, minimum wage and overtime pay.
- Since the passage of the Equal Pay Act in 1963 as part of the FLSA, the Act also prohibits gender-based wage discrimination.



FLSA Minimum Wage

- The Act requires employers of covered non-exempt employees to pay these employees a minimum wage of not less than \$7.25 per hour effective July 24, 2009. Youths under 20 years of age may be paid a minimum wage of not less than \$4.25 an hour during the first 90 consecutive calendar days of employment with an employer.
- Employers of “tipped” employees (i.e., those who customarily and regularly receive more than \$30 a month in tips) may consider such tips as part of their wages, but employers must pay a direct wage of at least \$2.13 per hour if they claim a tip credit.



FLSA Overtime

- If an employee is 16 years old or older, the Act does not limit either the number of hours in a day or the number of days in a week that an employer may require an employee to work.
- Similarly, the Act does not limit the number of hours of overtime that may be scheduled.
- However, the Act requires employers to pay covered employees not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek, unless the employees are otherwise exempt.



Georgia Law on Employment of Children

- No employment of those under 12 years old.
- No restrictions of employees 16 years old or over.
- Intent is to ensure persons 12 to 16 years old are in school.



Overtime Workweek

- Compliance is determined by workweek and
 - EACH WORKWEEK STANDS BY ITSELF!!
- According to FLSA a workweek is seven consecutive twenty four hour periods (or 168 hours).



Types of Coverage

- Enterprise Coverage: if an enterprise is covered, all employees of that enterprise are entitled to FLSA protection.
- Individual Coverage: even if the enterprise is not covered, individual employees may be covered and entitled to FLSA protections.



To What Enterprises Does the FLSA Apply?

- The Act applies to enterprises with employees who engage in interstate commerce, produce goods for interstate commerce, or handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce.
- For most entities with at least two employees, a test of not less than \$500,000 in annual dollar volume of business applies (if dollar volume is less than \$500,00 the act does not apply).



To What Enterprises Does the FLSA Apply

- Regardless of their dollar volume of business the FLSA does cover all the following: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally, or physically disabled or gifted; preschools, elementary, and secondary schools and institutions of higher education; and federal, state, and local government agencies.



Employees Who Are Exempt

- The Act exempts some employees from its overtime pay and minimum wage provisions, and it also exempts certain employees from the overtime pay provisions alone.
- Because the terms are narrowly defined, when in doubt contact your Employment Law Attorney.



Employees Exempt From Both Overtime and Minimum Wage Requirements

- Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals
- Employees engaged in fishing operations and seaman employed on foreign vessels
- Casual babysitters and companions for the elderly
- Employees of certain Seasonal amusement establishments
- Farm workers employed on small farms
- Switchboard operators of small telephone companies
- Employees engaged in newspaper delivery



Employees Exempt from Overtime Pay Requirements Only

- Certain commissioned employees of retail establishments
- Railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plan
- Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations
- Auto, truck, trailer, farm implement, boat, or aircraft salespersons employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers
- Domestic service workers who reside in their employers' residences
- Employees of motion picture theaters
- Farmworkers



Youth Employment

- Sixteen and seventeen year olds may be employed for unlimited hours in any occupation other than those deemed hazardous by the Department of Labor or O.C.G.A. § 39-2-1 and 39-2-2.
- Fourteen and Fifteen year olds may be employed outside school hours in a variety of non-manufacturing jobs for limited periods of time and under specified conditions.
- Children under 14 may not be employed in non-agricultural occupations covered by the FLSA.



Record Keeping

- The FLSA requires employers to keep records on wages, hours, and other items, as specified in Department of Labor recordkeeping regulations.
- Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations.



Record Keeping

- Records that must be kept include:
 - personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age;
 - hour and day when workweek begins;
 - total hours worked each workday and each workweek;
 - total daily or weekly straight-time earnings;



Record Keeping

- regular hourly pay rate for any week when overtime is worked;
- total overtime pay for the workweek;
- deductions from or additions to wages;
- total wages paid each pay period; and
- date of payment and pay period covered



Record Keeping

- Each employer shall preserve payroll records, collective bargaining agreements, sales and purchase records for at least three years.
- Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, and work and time schedules.



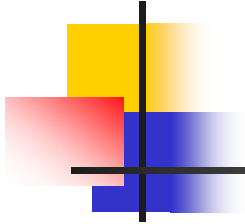
Enforcement

- Child Labor Violations
 - Willful violations may be prosecuted criminally and the violator fined up to \$10,000
 - A second conviction may result in imprisonment
 - Violators are also subject to a civil penalty of up to \$10,000 for each employee who was the subject of a violation



Enforcement

- Wage and Hour violations
 - Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,100 for each violation.



C. Jason Willcox

Moore, Clarke, DuVall & Rodgers, P.C.

2829 Old Dawson Road

Albany, Georgia

(229) 888-3338

(229) 888-1191 fax