

LEGISLATIVE BILL 608

Approved by the Governor May 30, 2003

Introduced by Landis, 46; Aguilar, 35; Bromm, 23; Combs, 32; Hartnett, 45; Janssen, 15; Johnson, 37; Kruse, 13; Louden, 49; McDonald, 41; Preister, 5; Price, 26; Raikes, 25; Schimek, 27; Schrock, 38; Vrtiska, 1

AN ACT relating to revenue and taxation; to amend sections 77-27,188.01, 77-27,189, and 77-27,191, Reissue Revised Statutes of Nebraska, and sections 77-27,187 to 77-27,188, 77-27,188.02, 77-27,190, 77-27,194, and 77-27,195, Revised Statutes Supplement, 2002; to change and eliminate provisions relating to the Employment Expansion and Investment Incentive Act; to harmonize provisions; to provide an operative date; to repeal the original sections; and to outright repeal section 13-2113, Reissue Revised Statutes of Nebraska, and section 77-27,193, Revised Statutes Supplement, 2002.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 77-27,187, Revised Statutes Supplement, 2002, is amended to read:

77-27,187. Sections 77-27,187 to 77-27,195 and section 3 of this act shall be known and may be cited as the Employment Expansion and Investment Incentive Act.

Sec. 2. Section 77-27,187.01, Revised Statutes Supplement, 2002, is amended to read:

77-27,187.01. For purposes of the Employment Expansion and Investment Incentive Act, unless the context otherwise requires:

(1) Any term has the same meaning as used in the Nebraska Revenue Act of 1967;

(2) Equivalent Nebraska employees means the number of Nebraska employees computed by dividing the total hours paid in a year to Nebraska employees by the product of forty times the number of weeks in a year;

(3) Nebraska employee means an individual who is either a resident or partial-year resident of Nebraska;

(4) Qualified employee leasing company means a company which places all employees of a client-lessee on its payroll and leases such employees to the client-lessee on an ongoing basis for a fee and, by written agreement between the employee leasing company and a client-lessee, grants to the client-lessee input into the hiring and firing of the employees leased to the client-lessee;

(5) Related taxpayers includes any corporations that are part of a unitary business under the Nebraska Revenue Act of 1967 but are not part of the same corporate taxpayer, any business entities that are not corporations but which would be a part of the unitary business if they were corporations, and any business entities if at least fifty percent of such entities are owned by the same persons or related taxpayers and family members as defined in the ownership attribution rules of the Internal Revenue Code of 1986, as amended;

(6) Taxpayer means a corporate taxpayer or other person subject to either an income tax imposed by the Nebraska Revenue Act of 1967 or a franchise tax under Chapter 77, article 38, ~~or exempt from such taxes under section 521 of the Internal Revenue Code of 1986, as amended,~~ or a partnership, limited liability company, S corporation, or joint venture when all of the partners, shareholders, or members are subject to or exempt from such taxes; and

(7) Year means the taxable year of the taxpayer.

Sec. 3. (1) For tax years beginning or deemed to begin on or after January 1, 2004, under the Internal Revenue Code of 1986, as amended, in order to earn the incentives set forth in the Employment Expansion and Investment Incentive Act, the taxpayer shall file an application for an agreement with the Tax Commissioner.

(2) The application shall contain:

(a) A written statement describing the full expected employment and investment for a qualified business in this state;

(b) Sufficient documents, plans, and specifications as required by the Tax Commissioner to support the plan and to define a project;

(c) An application fee of five hundred dollars. The fee shall be remitted to the State Treasurer for credit to the Employment Expansion and Investment Incentive Fund, which fund is hereby created. Any money in the fund available for investment shall be invested by the state investment

officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act. The application and all supporting information shall be confidential except for the name of the taxpayer, the location of the project, and the amounts of increased employment and investment.

(3) Once satisfied that the plan in the application defines a project that meets the investment, employment, and wage requirements and is located in an eligible county or enterprise zone, and that these requirements will be reached within the required time period, the Tax Commissioner shall approve the application and authorize the total amount of credits expected to be earned as a result of the project. The Tax Commissioner shall not approve further applications once the expected credits from the approved projects total two million five hundred thousand dollars in each of fiscal years 2004-05 and 2005-06 and three million dollars in fiscal year 2006-07 and each fiscal year thereafter. Four hundred dollars of the application fee shall be refunded to the applicant if the application is not approved because the expected credits from approved projects exceed such amounts. Applications for benefits shall be considered in the order in which they are received.

(4) After approval, the taxpayer and the Tax Commissioner shall enter into a written agreement. The taxpayer shall agree to complete the project, and the Tax Commissioner, on behalf of the State of Nebraska, shall designate the approved plans of the taxpayer as a project and, in consideration of the taxpayer's agreement, agree to allow the taxpayer to use the incentives contained in the Employment Expansion and Investment Incentive Act up to the total amount that were authorized by the Tax Commissioner at the time of approval. The application, and all supporting documentation, to the extent approved, shall be considered a part of the agreement. The agreement shall state:

(a) The levels of employment and investment required by the act for the project;

(b) The time period under the act in which the required level must be met;

(c) The documentation the taxpayer will need to supply when claiming an incentive under the act;

(d) The date the application was filed; and

(e) The maximum amount of credits authorized.

Sec. 4. Section 77-27,188, Revised Statutes Supplement, 2002, is amended to read:

77-27,188. (1) ~~(a)~~ A refundable credit against the taxes imposed by the Nebraska Revenue Act of 1967 shall be allowed to any taxpayer who has an approved application under the Employment Expansion and Investment Incentive Act, who is engaged in a qualifying business as described in section 77-27,189, and who after the operative date of this act:

(a) Increases ~~increases~~ the employment and investment of such business in ~~this state by two~~ any county in this state with a population of less than twenty-five thousand inhabitants, according to the most recent federal decennial census, or in any designated enterprise zone pursuant to 42 U.S.C. 11501 or the Enterprise Zone Act;

(b) Increases employment by five new equivalent Nebraska employees and who makes an increased investment in this state of at least ~~seventy-five~~ two hundred fifty thousand dollars ~~during a taxable year~~ prior to the end of the first taxable year after the year in which the application was submitted; and

(c) Pays a minimum qualifying wage of eight dollars and twenty-five cents per hour to the new equivalent Nebraska employees for which tax credits are sought under the Employment Expansion and Investment Incentive Act. The Department of Revenue shall adjust the minimum qualifying wages required for applications filed after January 1, 2004, and each January 1 thereafter, as follows: The current rural Nebraska average weekly wage shall be divided by the rural Nebraska average weekly wage for 2003; and the result shall be multiplied by the eight dollars and twenty-five cents minimum qualifying wage for 2003 and rounded to the nearest one cent. The amount of increase or decrease in the minimum qualifying wages for any year shall be the cumulative change in the rural Nebraska average weekly wage since 2003. For purposes of this subsection, rural Nebraska average weekly wage means the most recent average weekly wage paid by all employers in all counties with a population of less than twenty-five thousand inhabitants as reported by October 1 by the Department of Labor.

~~(b) Any taxpayer who has been allowed a credit under subdivision (1)(a) of this section during the preceding five taxable years, not counting carryovers, shall be allowed a credit for an increase in employment in this state by two new equivalent Nebraska employees.~~

(2) Except as provided in subsection (3) of this section, the The

amount of the credit shall be ~~one thousand five hundred~~ three thousand dollars for each new equivalent Nebraska employee and ~~one thousand two thousand seven hundred fifty~~ dollars for each ~~seventy-five~~ fifty thousand dollars of increased investment.

(3) ~~For any taxpayer described in subdivision (1)(a) of this section which is also located within the boundaries of an enterprise zone as defined and designated by the Department of Economic Development pursuant to the Enterprise Zone Act, the amount of the credit shall be:~~

~~(a) Four thousand five hundred dollars for each new equivalent Nebraska employee and three thousand dollars for each seventy-five thousand dollars of increased investment if at least fifty percent of the new equivalent Nebraska employees of the taxpayer reside within the boundaries of the enterprise zone; or~~

~~(b) Four thousand five hundred dollars for each new equivalent Nebraska employee residing within the boundaries of the enterprise zone, one thousand five hundred dollars for each new equivalent Nebraska employee not residing within the boundaries of the enterprise zone, and one thousand dollars for each seventy-five thousand dollars of increased investment if less than fifty percent of the new equivalent Nebraska employees of the taxpayer reside within the boundaries of the enterprise zone.~~

~~The credit allowed to a taxpayer pursuant to this subsection shall not exceed seventy-five thousand dollars in any one tax year.~~

~~For purposes of this subdivision, employees residing within the boundaries of an enterprise zone shall be construed to mean employees residing within a county in which an enterprise zone is located when the enterprise zone is not located in a city of the primary or metropolitan class.~~

~~For purposes of this subdivision, an employee residing within the enterprise zone shall mean an individual who is domiciled within the enterprise zone for the entire pay period.~~

~~(4) The credit shall be applied as provided in section 77-27,188.01.~~

~~(5) Any taxpayer who has qualified for a credit in the amount set out in subsection (3) of this section may elect to receive either the amount as calculated pursuant to subsection (2) or (3) of this section.~~

~~(6) An employee of a qualified employee leasing company shall be considered to be an employee of the client-lessee for purposes of this section if the employee performs services for the client-lessee. A qualified employee leasing company shall provide the Department of Revenue access to the records of employees leased to the client-lessee.~~

(4) The credit shall not exceed the amounts set out in the application and approved by the Tax Commissioner.

(5) (a) If a taxpayer who receives tax credits creates fewer jobs or less investment than approved in the project agreement, the taxpayer shall repay the tax credits as provided in this subsection.

(b) If less than seventy-five percent of the proposed jobs in the project agreement are created, one hundred percent of the job creation tax credits shall be repaid. If seventy-five percent or more of the proposed jobs in the project agreement are created, no repayment of the job creation tax credits is necessary.

(c) If less than seventy-five percent of the proposed investment in the project agreement is created, one hundred percent of the investment tax credits shall be repaid. If seventy-five percent or more of the proposed investment in the project agreement is created, no repayment of the investment tax credits is necessary.

Sec. 5. Section 77-27,188.01, Reissue Revised Statutes of Nebraska, is amended to read:

77-27,188.01. (1) The credit allowed under section 77-27,188 may be used to obtain a refund of state sales and use taxes paid or against the income tax liability of the taxpayer or may be used as a refundable credit claimed on an income tax return of the taxpayer. The return need not reflect any income tax liability owed by the taxpayer.

(2) A claim for the credit may be filed quarterly for refund of the state sales and use taxes paid, either directly or indirectly, after the filing of the income tax return for the taxable year in which the credit was first allowed.

(3) The credit may be used to obtain a refund of state sales and use taxes paid before the end of the taxable year for which the credit was allowed, except that the amount refunded under this subsection shall not exceed the amount of the state sales and use taxes paid, either directly or indirectly, by the taxpayer on the qualifying investment.

(4) For purposes of subsections (2) and (3) of this section, the taxpayer shall be deemed to have paid indirectly any state sales or use taxes paid by a contractor on property annexed to an improvement to real estate

built for the taxpayer. The contractor shall certify to the taxpayer the amount of the Nebraska state sales and use taxes paid on the materials, or the taxpayer, with the permission of the Tax Commissioner and a certification from the contractor that Nebraska state sales and use taxes were paid on all materials, may presume that fifty percent of the cost of the improvement was for materials annexed to real estate on which the tax was paid.

~~(5)(a) The credit shall be a nonrefundable credit when used against the income tax liability of the taxpayer. The credit shall be applied before any refundable credits are applied. Except as provided in subdivision (b) of this subsection, the amount of the credit that may be used in any taxable year shall not exceed fifty percent of the income tax liability of the taxpayer reduced by all other nonrefundable credits except the credits prescribed in section 77-4105.~~

~~(b) For any taxpayer receiving credit in an amount calculated pursuant to subsection (3) of section 77-27,188, the amount of the credit that may be used in any taxable year shall not exceed the amount of the income tax liability of the taxpayer reduced by all other nonrefundable credits except the credits prescribed in section 77-4105.~~

~~(6) The credit that is not used against liabilities incurred in the taxable year in which such credit was first allowable may be carried over and used against the liabilities incurred in the five immediately succeeding taxable years. The credits carried over shall be used in the order in which they were first allowed and before any additional credit allowable in a current taxable year may be used.~~

~~(5) (7) No claim for refund of sales and use taxes under this section may be filed prior to January 1, 1989.~~

~~(6) (8) Credits distributed to a partner, limited liability company member, shareholder, or beneficiary under section 77-27,194 may only be used against the income tax liability of the partner, member, shareholder, or beneficiary receiving the credits.~~

(7) For taxpayers who met the job and investment thresholds of the Employment Expansion and Investment Incentive Act for a tax year beginning before January 1, 2004, subsection (6) of this section and subdivision (1)(b) of section 77-27,188, as such section existed immediately prior to such date, shall continue to apply to such taxpayer. The changes made by this legislative bill shall not preclude a taxpayer from receiving the tax incentives earned prior to January 1, 2004.

Sec. 6. Section 77-27,188.02, Revised Statutes Supplement, 2002, is amended to read:

77-27,188.02. If the taxpayer does not maintain the ~~minimum~~ increases in the level of investment and employment ~~required~~ described in section 77-27,188 to create a credit for at least ~~two~~ three years after the year for which the credit was first allowed, +

~~(1) The taxpayer shall lose one-third of the amount of all used and unused credits. The for each year that the taxpayer has not maintained the required level of investment and employment, and~~

~~(2) During the subsequent two years, the taxpayer shall repay to the state one-third of the amount of the credit used for each year that the taxpayer has not maintained the required level of investment and employment used credits within one year after the failure to maintain such investment and employment.~~

Sec. 7. Section 77-27,189, Reissue Revised Statutes of Nebraska, is amended to read:

77-27,189. (1) A qualified business means any business engaged in the storage, warehousing, distribution, transportation, or sale of tangible personal property or in any of the following activities:

(a) The conducting of research, development, or testing for scientific, agricultural, animal husbandry, food product, or industrial purposes;

(b) The performance of data processing, telecommunication, insurance, or financial services. For purposes of this subdivision, financial services shall only include financial services provided by any financial institution subject to tax under Chapter 77, article 38, or any person or entity licensed by the Department of Banking and Finance or the Securities and Exchange Commission;

(c) The assembly, fabrication, manufacture, or processing of tangible personal property;

(d) The administrative management of any activities, including headquarter facilities relating to such activities; or

(e) Any combination of the activities listed in this subsection.

(2) Qualified business does not include:

(a) Any business activity in which eighty percent or more of the

total sales are sales to the ultimate consumer of food prepared for immediate consumption or are sales to the ultimate consumer of tangible personal property which is not (a) assembled, fabricated, manufactured, or processed by the taxpayer or (b) used by the purchaser in any of the activities listed in subsection (1) of this section; and

(b) Any casino. (1) A qualifying business shall mean any business engaged in the activities listed in subdivisions (1)(b)(i) through (vii) of this section or in the storage, warehousing, distribution, transportation, or sale of tangible personal property, except that qualifying business shall not include any business activity in which eighty percent or more of the total sales are sales to the ultimate consumer of tangible personal property which is not (a) assembled, fabricated, manufactured, or processed by the taxpayer or (b) used by the purchaser in any of the following activities:

(i) The assembly, fabrication, manufacture, or processing of tangible personal property;

(ii) The feeding or raising of livestock;

(iii) The conducting of research, development, or testing for scientific, agricultural, animal husbandry, or industrial purposes;

(iv) The performance of data processing, telecommunication, insurance, or financial services;

(v) Farming or ranching;

(vi) The administrative management or the headquarters of any of the activities listed in subdivisions (i) through (vii) of this subdivision or any activity excluded solely because of its retail sales; or

(vii) Any combination of the activities listed in this section.

(2) A qualifying business shall also mean any individual or association of individuals (a) licensed pursuant to the Uniform Licensing Law to practice medicine and surgery or osteopathic medicine and surgery, (b) who practice from an office located in an enterprise zone designated pursuant to the Enterprise Zone Act, which zone is not located within the boundaries of a city of the metropolitan or primary class, and (c) whose area of practice is in the primary care areas of family practice, general practice, general internal medicine, general pediatrics, general surgery, or obstetrics and gynecology.

Sec. 8. Section 77-27,190, Revised Statutes Supplement, 2002, is amended to read:

77-27,190. (1) A taxpayer shall be deemed to have a new equivalent Nebraska ~~employee~~ employees when the ~~number of new~~ equivalent Nebraska employees hired during a taxable year exceeds the ~~number of equivalent Nebraska employees during each of the three preceding taxable years are in addition to the number of total equivalent employees in the taxable year preceding the date of application.~~

(2) Qualifying business employees who work within and without this state shall be considered only to the extent they are paid for work performed within this state.

(3) The hours worked by any person considered an independent contractor or the employee of another taxpayer shall not be used in the computation under this section.

Sec. 9. Section 77-27,191, Reissue Revised Statutes of Nebraska, is amended to read:

77-27,191. (1) A taxpayer shall be deemed to have made an increased investment in this state to the extent the value of the property used or available for use on the last day of the taxable year exceeds (a) the value of all property used or available for use on the ~~first last~~ day of the taxable year previous to the date the application was filed. ~~or (b) the average investment in this state during each of the three preceding taxable years, whichever is greater.~~

~~(2) The average investment in this state shall be the average of the value of all property used or available for use on the first day of the taxable year and the last day of the taxable year.~~

~~(2) (3) To determine the value of property owned by the taxpayer, the tax basis before allowance for depreciation shall be used. To determine the value of property rented by the taxpayer, the annual rent of the property shall be multiplied by eight.~~

~~(3) (4) Only investment in improvements to real property and tangible personal property that are depreciable under the Internal Revenue Code shall be considered.~~

~~(4) (5) Vehicles, planes, or railroad rolling stock shall be excluded in determining the investment or average investment under this section.~~

~~(6) For taxable years 1987 and 1988 only, taxpayers claiming credits under section 77-27,188 shall qualify for credits to the extent allowed either~~

under the provisions of this section as it existed after the passage of Laws 1987, LB 270, or as amended by Legislative Bill 335, Ninety-first Legislature, First Session, 1989.

Sec. 10. Section 77-27,194, Revised Statutes Supplement, 2002, is amended to read:

77-27,194. The credit allowed under the Employment Expansion and Investment Incentive Act shall not be transferable, except in the following situations:

(1) Any credit allowable to a partnership, a limited liability company, a subchapter S corporation, or an estate or trust may be distributed to the partners, limited liability company members, shareholders, or beneficiaries. Any credit distributed shall be distributed in the same manner as income is distributed. A credit distributed shall be considered a credit used and the partnership, limited liability company, subchapter S corporation, estate, or trust shall be liable for any repayment under section 77-27,188.02; and

(2) The incentives previously allowed and the future allowance of incentives may be transferred when a project covered by an agreement is transferred by sale or lease to another taxpayer or in an acquisition of assets qualifying under section 381 of the Internal Revenue Code of 1986;

(3) The acquiring taxpayer, as of the date of notification of the Tax Commissioner of the completed transfer, shall be entitled to any unused credits and to any future incentives allowable under the act;

(4) The acquiring taxpayer shall be liable for any repayment that becomes due after the date of the transfer for the repayment of any benefits received either before or after the transfer; and

(5) ~~(2)~~ If a taxpayer operating a qualifying business and allowed a credit under section 77-27,188 dies and there is credit remaining after the filing of the final return for the taxpayer, the personal representative shall determine the distribution of the credit or any remaining carryover with the initial fiduciary return filed for the estate. The determination of the distribution of credit may be changed only after obtaining the permission of the Tax Commissioner.

Sec. 11. Section 77-27,195, Revised Statutes Supplement, 2002, is amended to read:

77-27,195. ~~(1)~~ The Tax Commissioner shall prepare a report identifying the amount of investment in this state and the number of equivalent jobs created by each taxpayer claiming a credit pursuant to the Employment Expansion and Investment Incentive Act. The report shall include the amount of credits claimed in the aggregate. The report shall be issued on or before March 15 of each year beginning with March 15, 1988, for all credits allowed during the previous calendar year.

~~(2) In the report for any year in which a taxpayer located in an enterprise zone designated pursuant to the Enterprise Zone Act claimed a credit pursuant to subsection (3) of section 77-27,188, the Tax Commissioner shall identify (a) the amount of investment made in each enterprise zone by all taxpayers claiming credits, (b) the number of jobs created in each enterprise zone by all taxpayers claiming credits, (c) the number of jobs created in each enterprise zone by all taxpayers claiming credits held by residents of the enterprise zone, and (d) the average wage on an hourly basis or the average annual salary of new jobs created in each enterprise zone by all taxpayers claiming credits.~~

Sec. 12. This act becomes operative on January 1, 2004.

Sec. 13. Original sections 77-27,188.01, 77-27,189, and 77-27,191, Reissue Revised Statutes of Nebraska, and sections 77-27,187 to 77-27,188, 77-27,188.02, 77-27,190, 77-27,194, and 77-27,195, Revised Statutes Supplement, 2002, are repealed.

Sec. 14. The following sections are outright repealed: Section 13-2113, Reissue Revised Statutes of Nebraska, and section 77-27,193, Revised Statutes Supplement, 2002.