

CHAPTER 207
FORMERLY
SENATE BILL NO. 200

AN ACT TO AMEND TITLE 30, CHAPTERS 5 AND 20 OF THE DELAWARE CODE RELATING TO BUSINESS TAX CREDITS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 515(c)(1), Title 30 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 515 Filing frequency and tax computation thresholds [Effective July 1, 2016]

(c) Applicability.

(1) The applicable thresholds subject to annual adjustment shall include:

- a. The figure "\$1,000" as it appears in § 521(c) of this title;
- b. The figure "\$1,000" as it appears in § 552(b) of this title;
- c. The figures "\$4,500" and "\$25,000" wherever they appear in § 1154(a) of this title;
- d. The figure "\$20,000,000" as it appears in § 1905(5) of this title;
- e. The figure "\$20,000,000" as it appears in § 2070(a)(2) of this title;
- ef. The figure "\$1,500,000" as it appears in § 2301(d)(2) of this title;
- fg. The figure "\$1,500,000" as it appears in § 2502(c)(2) of this title;
- gh. The figure "\$1,500,000" as it appears in § 2702(b)(3) of this title;
- hi. The figure "\$1,500,000" as it appears in § 2703(c)(2) of this title;
- ij. The figure "\$1,500,000" as it appears in § 2902(c)(2) of this title;
- jk. The figure "\$1,500,000" as it appears in § 2903(c)(2) of this title;
- kl. The figure "\$3,000,000" as it appears in § 2904(c)(2) of this title;
- lm. The figure "\$1,500,000" as it appears in § 2905(b)(2) of this title;
- mn. The figure "\$1,500,000" as it appears in § 2906(c)(2) of this title;
- no. The figure "\$3,000,000" as it appears in § 2907(c)(2) of this title; and
- op. The figure "\$1,500,000" as it appears in § 2908(c)(2) of this title.

Section 2. Amend Subchapter VIII, Chapter 20, Title 30 of the Delaware Code by making insertions as shown by underlining and deletions as show by strike through as follows:

§ 2070 Amount of credit and applicable procedures.

~~(a) A taxpayer who takes into account for purposes of Delaware income taxation Delaware qualified research and development expenses in a taxable year may apply for a research and development tax credit as provided in this subchapter. Taxpayers must complete an application for the credit on a form prescribed by the Director. Such application must be received by the Director no later than September 15 of a tax year.~~

~~(b)~~(a) Credit calculation. —

(1) General rule. — ~~Subject to the limitation of § 2075 of this title on overall credits and the limitation described in subsection (c) of this section, a~~ A taxpayer may elect a Delaware research and development tax credit for the taxable year equal to: (1) 10% of the excess of the taxpayer's total Delaware qualified research and development expenses for the taxable year over the taxpayer's Delaware base amount, or (2) 50% of Delaware's apportioned share of taxpayer's federal research and development tax credit calculated using the alternative ~~incremental~~ simplified credit method under § 41(c)(4)(5) of the Internal Revenue Code of 1986 (26 U.S.C. § 41(c)(4)(5)), using federal definitions and methodology. Delaware's apportioned share of the federal credit shall be the amount of the alternative ~~incremental~~ simplified credit the taxpayer can claim under § 41(c)(4)(5) (26 U.S.C. § 41(c)(4)(5)), multiplied by a percentage equal to the ratio of the taxpayer's Delaware qualified research and development expenses for the taxable year to the taxpayer's total qualified research and development expenses for the taxable year. A taxpayer's Delaware research and development tax credit determination election shall be an annual election, and shall be independent of taxpayer's federal research and development tax credit determination.

(2) Alternative calculation for small businesses. — In the case of a small business, paragraph ~~(b)~~(a)(1) of this section shall be applied by substituting "20%" for "10%" and by substituting "100%" for "50%." For the purposes of this subsection, "small business" means any taxpayer with average annual gross receipts, as determined by § 41(c)(1)(B) of the Internal Revenue Code of 1986 (26 U.S.C. 41(c)(1)(b)), not in excess of the applicable threshold of \$20,000,000. Taxpayers making use of the alternative calculation provided in this paragraph must conform to the definition of "small business" set forth herein without regard to the method by which the taxpayer calculates its federal research and development tax credit. The level of the applicable threshold in this subsection is subject to annual adjustment as more fully set forth in § 515 of this title.

~~(e) The research and development tax credit calculated pursuant to subsection (b) of this section shall not exceed in any one taxable year 50% of the qualified tax liability for that taxable year.~~

~~(d) By December 15 following the date of the application, the Director shall notify the taxpayer of the amount of the taxpayer's approved Delaware research and development tax credit taking into account the limitation contained in § 2075 of this title.~~

~~(e)(b)~~ A research and development tax credit ~~approved by the Director~~ shall be applied against the taxpayer's qualified tax liability for the taxable year in which the qualified research and development expenses were taken into account for purposes of Delaware income taxation. In the case of partnerships, the credit shall be allocated among partners as provided in § 41(f)(2)(B) of the Internal Revenue Code of 1986 [26 U.S.C. § 41(f)(2)(B)].

(c) If the taxpayer cannot use the entire amount of the approved Research and Development Tax Credit, such unused credit shall be paid to it in the nature of a tax refund.

~~(f) If, by virtue of the limitation described in subsection (e) of this section, the taxpayer cannot use the entire amount of the approved Research and Development Tax Credit for the taxable year in which it is first approved, then the approved excess may be carried over to succeeding taxable years and used as a credit against the qualified tax liability of the taxpayer for those taxable years. The approved Research and Development Tax Credit provided by this chapter may be carried over and applied to no more than 15 succeeding taxable years following the first taxable year for which the taxpayer was entitled to claim the credit.~~

~~(g) A taxpayer is not entitled to carry back or assign an unused research and development tax credit.~~

~~§ 2073 Time limitations.~~

~~The termination date in § 41(h) of the Internal Revenue Code (26 U.S.C. § 41(h)) does not apply to a Δ taxpayer who is eligible for the Research and Development Tax Credit under this chapter for the taxable year in which the Delaware qualified research and development expenses are taken into account for purposes of Delaware income taxation shall continue to be eligible for the credit permitted under this chapter, even if the federal research and development tax credit provided by § 41 of the Internal Revenue Code has been terminated or revoked.~~

~~§ 2074 Transitional rule.~~

~~For the purpose of calculating Delaware qualified research and development expenses used in calculating the Delaware base amount for taxable years ending after December 31, 1995, and before January 1, 2000, if the taxpayer has taken into account for purposes of Delaware income taxation qualified research and development expenses both inside and outside this State and is unable to determine the amount of Delaware qualified research and development expenses, the taxpayer may file a request with the Director to calculate Delaware qualified research and development expenses by multiplying qualified research and development expenses in all states by the average of the payroll and property factors calculated in accordance with § 1903 of this title for the corresponding taxable years in question. The request shall set forth reasonable cause for the taxpayer's inability to make such determination and may use the calculation specified in this section only upon approval of the Director.~~

~~§ 2075 Limitation on credits.~~

~~(a) The total amount of credits approved by the Director with respect to all taxpayers shall not exceed \$5,000,000 in any State fiscal year.~~

~~(b) If the total amount of research and development tax credits for which all taxpayers applied in any year exceeds the amount allocated for those credits, then the research and development tax credit to be received by~~

~~each applicant shall be the product of \$5,000,000 multiplied by a fraction, the numerator of which is the eligible research and development tax credit applied for by the applicant and the denominator is the total of all eligible research and development tax credits applied for by all applicants.~~

Section 3. Amend Subchapter IX, Chapter 20, Title 30 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through, as follows:

§ 2080 Declaration of purpose.

The purpose of this subchapter shall be to create incentives ~~for new~~ to attract and retain Delaware ~~employment employers which employ~~ for the most qualified individuals working in the forefront of traditional and emerging business competition.

§ 2081 Definitions.

As used in this subchapter:

(1) "Affiliated group" has the meaning provided by § 1504 of the Internal Revenue Code (26 U.S.C. § 1504), but including for this purpose pass-through entities, as defined in § 1601 of this title that would be includible if they were classified as corporations, the equity interests in which would be treated as stock, and the ownership of such interests would satisfy the stock ownership requirements of the said 26 U.S.C. § 1504.

(2) "Base year" shall mean the calendar year immediately preceding a qualified employer's first certified year.

(3) "Brownfield" shall have the meaning set forth in § 9103 of Title 7.

(4) "Certified," "certification," or "recertification" mean or refer in their context to the first written determination of the Secretary issued to an employer that it is a qualified employer pursuant to the provisions of this subchapter, or the Secretary's annual review of that written determination.

(5) "Certified year" shall mean a calendar year for which an employer is certified to be eligible for New Economy Jobs Program credits under this subchapter.

(6) "Compensation" means that part of the sum reported on Form W-2, or equivalent form of the United States Department of Treasury, Internal Revenue Service as "Medicare wages and tips" that is attributable to Delaware sources.

(7) "Corporate restructuring" shall mean a transaction that qualifies pursuant to §§ 355 or 368 of the Internal Revenue Code (26 U.S.C. §§ 355 or 368).

~~(7)~~(8) "Credit" means a reduction of the final balance for tax or fees reported due by a qualified employer on a tax or information return pursuant to the New Economy Jobs Program.

~~(8)~~(9) "Director" means the Director of the Delaware Economic Development Office as defined in § 5002(c) of Title 29.

~~(9)~~(10) "Eligible job" means any single position held by a common-law employee in this State for which the compensation equals or exceeds the salary threshold. More than 1 consecutive employee may perform an eligible job during a single calendar year so long as the total compensation of all consecutive employees performing such eligible jobs during such calendar year equals or exceeds the salary threshold.

~~(10)~~(11) "Incorporated municipality" means and includes the area within the January 1, 2007, boundaries of cities, towns and villages created under any general or special law of this State for general governmental purposes which possess legislative, administrative and police powers for the general exercise of municipal functions and which carry on such functions through a set of elected and other officials.

~~(11)~~(12) "Inflation adjustment factor" means an amount equal to the Consumer Price Index prepared by the Bureau of Labor Statistics, U.S. Department of Labor for urban consumers, U.S. city average, all items, that corresponds to the calendar year for which the credit is calculated divided by the equivalent Consumer Price Index figure for 2007. Final calculations of the inflation adjustment factor for a calendar year shall be based on data available April 1 of the following calendar year.

~~(12)~~(13) "New Economy Jobs Program" means the Program authorized pursuant to this subchapter to encourage the creation of high wage, knowledge-based jobs in this State.

(14) "Principal executive office" shall mean the address identified as the corporation's principal executive office in a 10-Q or 10-K filing with the Securities and Exchange Commission.

(15) "Retained employee" means a common-law employee employed by a qualified retained employer in a retained eligible job in this State.

(16) "Retained eligible job" means any single position held by a retained employee in this State. More than one retained employee may perform a retained eligible job during a single calendar year.

~~(13)~~(17) "Qualified employee" means a common-law employee employed in an eligible job in this State.

~~(14)~~(18) "Qualified employer" means an employer certified to be eligible for New Economy Jobs Program credits under this subchapter.

(19) "Qualified retained employer" means an employer certified to be eligible for New Economy Jobs Program credits under this subchapter and within the three-year period prior to certification:

(a) the employer has gone through a corporate restructuring; and

(b) the employer, a predecessor of the employer or a member of the employer's affiliated group had its principal executive office located within this State, and at the time of certification:

1. a. is a publicly traded company with its business focused on agricultural seed and crop protection products; and

b. identifies the address of its principal executive offices as being located within this State; or

2. a. is a publicly traded company with its business focused on nutrition and health, industrial biosciences, safety and protection and/or electronics and communications; and

b. identifies the address of its principal executive offices as being located within this State.

~~(15)~~(20) "Qualified withholding payments" means (subject to the limitations of § 2084 of this title) the total amount of tax withheld, accounted for, and paid to the Secretary pursuant to subchapter VII of Chapter 11 of this title by a qualified employer or qualified retained employer on account of the compensation paid so many of the qualified employees, ~~or~~ vital employees or retained employees as are counted in determining New Economy Program credits.

~~(16)~~(21) "Salary threshold" means the amount of Delaware sourced compensation paid to a common law employee, rounded to the nearest \$100, calculated by multiplying \$100,000 times the inflation adjustment factor.

~~(17)~~(22) "Secretary" means the individual appointed as administrator and head of the Delaware Department of Finance pursuant to § 8302 of Title 29.

~~(18)~~(23) "Targeted growth area" means a geographic area designated as "investment level 1" or "investment level 2" on the strategy maps of the most recent executive order approving the strategies for state policies and spending, originally approved in December, 1999.

~~(19)~~(24) "Targeted growth county" means a county in this State having, on June 30, 2007, fewer than 250,000 inhabitants as reported in the most recent County Population Estimate of the United States Department of Commerce, Bureau of Census.

~~(20)~~(25) "Vital employee" means a common-law employee employed in a vital job in this State.

~~(21)~~(26) "Vital job" means any single position held by a vital employee in this State.

§ 2082 Certification as a qualified employer; recertification.

(a) Application for certification as a qualified employer or qualified retained employer will be made to the Secretary with a copy to the Director.

(b) The Secretary shall annually review the certification of qualified employers and qualified retained employers for eligibility for New Economy Jobs Program credits before credits are allowed.

(c) Credits allowable during the first certified year will be prorated upon the basis of the number of months before and after certification.

(d) For any single calendar year subsequent to its first certified year in which a qualified employer hires and employs no fewer than 50 additional qualified employees in new eligible jobs or no fewer than 200 additional vital employees in new vital jobs, the qualified employer may:

(1) Elect to treat such additional qualified employees either as an addition to its existing number of qualified employees under its existing certification; or

(2) Make a separate application pursuant to this section and § 2083 of this title for certification and credits with respect to such additional qualified employees.

§ 2083 Credits for New Economy Jobs Program employment.

(a) Subject to the limitations contained in § 2084 of this title and to such return requirements as may be imposed by the Delaware Bank Commissioner, Delaware Insurance Commissioner, or the Secretary, qualified employers and qualified retained employers shall be eligible during ~~its~~ their first certified year and for the 9 taxable years thereafter for credits against the taxes and/or fees imposed by the following statutory provisions:

- (1) Chapter 11 of Title 5;
- (2) Sections 702 and 703 of Title 18;
- (3) Chapter 19 of this title;
- (4) Other fees and taxes imposed under this title.

The amount of credit shall be determined under subsections (b) ~~and (e)~~ through ~~(d)~~ (e) of this section. Credits under this section shall be taken by the qualified employer or qualified retained employer against taxes in the order specified in this subsection and to the extent thereof.

(b) Credits based on minimum ~~and~~ additional employment in eligible jobs. —

(1) Subject to the limitations herein and in § 2084 of this title, in the case of a qualified employer which employs in a certified year no fewer than 50 qualified employees in excess of the number of its qualified employees during its base year, the credit granted under subsection (a) of this section shall be that product determined by multiplying:

a. X, where "X" equals the total of its qualified withholding payments on the compensation of its qualified employees hired and employed after the base year in new eligible jobs, by

b. The credit percentage, which shall consist of the sum of the following:

1. 25%, plus
2. 0.075% for each qualified employee (in excess of 50 more than the number of qualified employees employed during its base year) hired and employed in new eligible jobs.

(2) In no case shall the total credit available under this subsection exceed 40% times X.

(3) In no case shall qualified employees counted for purposes of claiming New Economy Jobs Program credits under this subsection be included in the calculation of employment under subsections (c) or (d) of this section.

(c) Credits based on minimum ~~and~~ additional employment in vital jobs. —

(1) Subject to the limitations herein and in § 2084 of this title, in the case of a qualified employer which: (i) employs in a certified year no fewer than 200 vital employees in excess of the number of its vital employees during its base year and (ii) provides an average compensation to such vital employees of at least \$70,000, the credit granted under subsection (a) of this section shall be that product determined by multiplying:

a. X, where "X" equals the total of its qualified withholding payments on the compensation of its vital employees hired and employed after the base year in new vital jobs, by

b. The credit percentage, which shall consist of the sum of the following:

1. 25%, plus
2. 0.05% for each vital employee (in excess of 200 more than the number of vital employees employed during its base year) hired and employed in new vital jobs.

(2) In no case shall the total credit available under this subsection exceed 40% times X.

(3) In no case shall vital employees counted for purposes of claiming New Economy Jobs Program credits under this subsection be included in the calculation of employment under subsections (b) or (d) of this section.

(d) Credits based on minimum employment in retained eligible jobs. —

(1) Subject to the limitations herein and in § 2084 of this title, in the case of a qualified retained employer which: (i) maintains in a certified year no fewer than 200 retained eligible jobs and (ii) provides an average annual compensation of at least \$70,000 to the retained employees in such retained eligible jobs, the credit granted under subsection (a) of this section shall be the product determined by multiplying:

a. X, where "X" equals the total of its qualified withholding payments on the compensation of its retained employees employed in retained eligible jobs, by

b. The credit percentage, which shall consist of the sum of the following:

1. 25%, plus

2. 0.05% for each retained employee in excess of 200 retained employees employed in retained eligible jobs.

(2) In no case shall the total credit available under this subsection exceed 40% times X.

(3) In no case shall retained employees counted for purposes of claiming New Economy Jobs Program credits under this subsection be included in the calculation of employment under subsections (b) or (c) of this section.

~~(e)~~ (e) Additional credit based on geographic employment. — In addition to the credits determined on the qualified withholding payments for qualified employees, ~~or~~ vital employees or retained employees identified under subsections (b) ~~and through~~ ~~(e)~~ (d) of this section, a qualified employer or qualified retained employer may claim additional credits determined by:

(1) Multiplying Y-1 times 10%, where "Y-1" equals the total of the qualified withholding payments on the compensation of such qualified employees, ~~or~~ vital employees or retained employees identified to be employed in new eligible jobs, ~~or~~ vital jobs or retained eligible jobs in an incorporated municipality or a targeted growth area,

(2) Multiplying Y-2 times 5%, where "Y-2" equals the total of the qualified withholding payments on the compensation of such qualified employees, ~~or~~ vital employees or retained employees identified to be employed in new eligible jobs, ~~or~~ vital jobs or retained eligible jobs in a reclaimed Brownfield in which the qualified employer is the first tenant, and

(3) Multiplying Y-3 times 10%, where "Y3" equals the total of the qualified withholding payments on the compensation of such qualified employees, ~~or~~ vital employees or retained employees identified to be employed in new eligible jobs, ~~or~~ vital jobs or retained eligible jobs in a targeted growth county.

§ 2084 Limitation on credits and qualified withholding payments.

Notwithstanding § 2083 of this title,

(1) The total amount of New Economy Jobs Program credit allowable under this subchapter for any qualified employer or qualified retained employer during any calendar year shall not exceed 65% percent of its qualified withholding payments;

(2) If the Secretary finds that a qualified employer's or a qualified retained employer's qualified withholding payments unreasonably exceed the amount of tax required to be withheld, accounted for, and paid by a taxpayer to the Secretary pursuant to subchapter VII of Chapter 11 of this title the Secretary may limit such qualified withholding payments to an amount which is reasonable. The Secretary or the Secretary's delegate shall mail written notice of such determination to the taxpayer. The taxpayer may, within 30 days of the date of mailing such notice, institute a written protest of such finding to the Secretary in the manner provided under § 523 of this title for protests of assessments. The Secretary's determination of the protest shall be final;

(3) No qualified employees, ~~or~~ vital employees or retained employees counted for purposes of claiming New Economy Jobs Program credits under this subchapter may be included in the calculation of

employment for purposes of claiming tax credits provided by subchapters II, ~~and III, VII~~ and X of this chapter or as provided by § 1105(h) of Title 5;

(4) No qualified employee or vital employee in any certified year who was employed in Delaware in the base year by a member of an affiliated group which conducted or conducts business in this State during the base year or any year thereafter shall be counted as newly hired or employed qualified employees or vital employees or qualified employees in new eligible jobs for purposes of calculating the New Economy Jobs Program credits under this subchapter; and

(5) No more than 10% of the total number of qualified employees or vital employees counted for purposes of claiming New Economy Jobs Program credits under this subchapter may be individuals who were required by the provisions of Chapter 11 of this title to file a personal income tax return for the base year.

§ 2085 Disposition of unused credits.

To the extent a qualified employer's or a qualified retained employer's New Economy Jobs Program credits exceed any amounts otherwise due for the taxes and fees listed under § 2083(a) of this title but do not exceed the limitation of § 2084 of this title, such unused credits shall be paid to it in the nature of tax refunds.

~~§ 2086 Sunset date.~~

~~This subchapter and the amendments to § 2010 of this title, made by 76 Del. Laws c. on 78, § 2, shall apply to qualified employers whose first certified year commences prior to January 1, 2014.~~

Section 4. Section 1 of this Act shall take effect on July 1, 2016 and shall require the initial calculations of computation thresholds occur on or before September 20, 2016. Section 2 of this Act shall be effective for Research and Development expenses allowed in accordance with Section 41 of the Internal Revenue Code with regard to tax periods after December 31, 2016. Section 3 of this Act shall be effective for Qualified Withholding Payments received by the State after December 31, 2016.

Section 5. This Act may be cited as "The Delaware Commitment to Innovation Act of 2016."

Approved March 17, 2016