STATE OF ARKANSAS

Department of Finance and Administration

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RE: Company Qualifications for Targeted Create Rebate
Opinion No.: 20180420

Dear Counsel Burleson:

This is in response to your letter seeking the issuance of a legal opinion from the Arkansas Department of Finance and Administration (DFA). In your email, you request, *"We have a company we are considering offering Targeted Create Rebate to and wanted to get your stance on the qualifications."* You further state the following:

To qualify a company must:

- Pay an average wage at least 175% of the state or county average wage; whichever is less
- Have a minimum payroll of new full time employees of more than $250,000
- Be defined as a Targeted Business

A few questions:

1) How long does the company have to meet the minimum wage and payroll thresholds?
2) A "Targeted Business" must have been in operation for less than 5 years. When do you consider the 5 year clock starts? In the "Targeted Business" definition, there is language in the rules and regs that states the 5 year clock starts once the company has met the minimum annual payroll and equity requirements. There is corresponding language in the other Targeted Incentives that define the minimum annual payroll and equity requirements but there is no such language defining the requirements in the Targeted Create Rebate language.
3) For the Targeted Business incentives that clearly have a defined payroll requirement (i.e. minimum of $100,000 and maximum of $1,000,000) to qualify, do you only consider those requirements during the initial application/qualification period or do those requirement apply throughout the incentive accrual period? So

if a company receives a 5 year Payroll Income Tax Credit for Targeted Businesses and their payroll exceeds $1,000,000 in year 3, are they disqualified from the program for the remaining 2 years?

RESPONSE

Your inquiry concerned several issues related to offering Targeted Create Rebate. Businesses that qualify as "targeted businesses" may qualify for three specific incentives designed to help new, knowledge-based businesses. Companies that are doing business in a targeted business sector (see below, Response One), may qualify for:

1) The Targeted Tax Back program provides a refund of sales and use taxes paid on the purchase of building materials and machinery and equipment associated with the approved project § 15-4-2706(e).
2) A 10% tax credit based on payroll § 15-4-2709.
3) A 33 % tax credit on eligible research expenditures § 15-4-2708(c).
4) Payroll Rebate for Targeted Businesses § 15-4-2707(e).

The income tax credits earned under § 15-4-2709 amd §15-4-2708(c) may be sold upon approval by the Arkansas Economic Development Commission. In addition, to qualify as a targeted business companies must meet the following requirements and be classified by AEDC in one of the six targeted emerging technology sectors, must have an annual payroll of at least one hundred thousand dollars ($100,000) and demonstrate evidence of an equity investment in the targeted business of at least two hundred fifty thousand dollars ($250,000). The business must have been in operation for five years or less and must pay, at minimum, 150% of the lesser of the state or county average wage.

Question One:
How long does the company have to meet the minimum wage and payroll thresholds?

Response:
Under Ark. Code Ann. § 15-4-211 (f)(1) (Administration), "All claims for payroll rebate payments under Ark. Code Ann. § 15-4-2707 shall be certified to the Department of Finance and Administration and shall be recertified annually thereafter during the term of the financial incentive agreement. Thus, AEDC may enter into an agreement with a company, which shall be recertified each year thereafter and which begins the contractual agreement. Thereafter, under Ark. Code Ann. §15-4-2711 (g), if the annual payroll of the business applying for benefits is not met within twenty-four (24) months after signing the financial incentive agreement, the business may request in writing an extension of time to reach the required payroll threshold. Such an extension may be may be granted for a time not to exceed forty-eight (48) months. If a business fails to reach the annual payroll threshold before the expiration of the twenty-four (24) months or the time period established by a subsequent extension of time, the business will be liable for the repayment of all benefits previously received by the business.

Question Two:
A "Targeted Business" must have been in operation for less than 5 years. When do you consider the 5 year clock starts? In the "Targeted Business" definition, there is language in the rules that states the 5 year clock starts once the company has met the minimum annual payroll and equity requirements. There is corresponding language in the other Targeted Incentives that define the minimum annual payroll and equity requirements but there is no such language defining the requirements in the Targeted Create Rebate language.

Response:
Under Ark. Code Ann. §15-4-2703 (43),

> (A) "Targeted businesses" means a group of growing business sectors, not to exceed six (6), that include the following: (i) Advanced materials and manufacturing systems; (ii) Agriculture, good, and environmental sciences; (iii) Biotechnology, bioengineering, and life sciences; (iv) Information technology; (v) Transportation logistics; and (vi) Bio-based products.
> (B) In order to receive benefits as a targeted business the business must: (i) Have been operating in the state for less than five (5) years; (ii) Pay not less than one hundred fifty percent (150%) of the lesser of the county or state average hourly wage; and (iii) Have been selected to receive special benefits.

For purposes of determining whether a business has been operating ***in the state*** for less than five (5) years,--it is exactly as stated: a determination must be made by the Director of AEDC as to when the targeted business began operating in Arkansas, and it must be for less than five (5) years. The targeted business is considered operating in Arkansas when the minimum annual payroll threshold is met and the minimum equity investment has been constructively received. Once these thresholds are met, the business has five (5) years in which it is eligible to apply as a targeted business. <u>See</u> AEDC Agency Rules and Regulations (2018).

Question Three:
For the Targeted Business incentives that clearly have a defined payroll requirement (i.e. minimum of $100,000 and maximum of $1,000,000) to qualify, do you only consider those requirements during the initial application/qualification period or do those requirements apply throughout the incentive accrual period? So if a company receives a 5 year Payroll Income Tax Credit for Targeted Businesses and their payroll exceeds $1,000,000 in year 3, are they disqualified from the program for the remaining 2 years?'

Response:
Your question does not concern a Targeted Create Rebate as previously mentioned in your question; however, your question does apply to the Targeted Business Payroll Incentives under Ark. Code Ann. § 15-4-2709. The calculation of the benefit for an income tax credit for new targeted businesses is dependent upon the following conditions:

· A minimum payroll of one hundred thousand dollars ($100,000) being ***maintained*** during the term of the agreement;
· The business operations' continuing in one (1) of the six (6) targeted areas;
· The average hourly wage threshold being maintained; and
· The business's continuing to operate in accordance with the qualification requirements ***throughout the term*** of the financial incentive agreement.

Regarding Targeted Business Incentives requirements, it is important to note that for Targeted Businesses, the payroll income tax credit for Targeted Business authorized by §15-4-2709 may be combined with the Sales and Use Tax Refund for targeted businesses as authorized by §15-4-2706(e) and the Research and Development Income Tax Credit for targeted businesses as authorized by §15-4-2708(c), if approved by the Director. Specifically, regarding the example provided in your question, the company would not be eligible to continue receiving the benefit of the incentive because the minimum and maximum payroll requirements must be maintained during the term of the agreement. Further, the business must continue to operate in accordance with the qualification requirements throughout the term of the financial agreement.

This opinion is based on my understanding of the facts as set forth in your inquiry as those facts are governed by current Arkansas laws, rules, and regulations. Any change in the facts or law could result in a different opinion.

Sincerely,

Michelle Bridges-Bell, Attorney
Revenue Legal Counsel