Tax003_EmR1105.pdf **Revenue – Creates s. Tax 3.05 - EmR1105**

**Publication Date:** **April 7, 2011**
**Effective Date:** **April 7, 2011 through September 3, 2011**

**ORDER OF THE DEPARTMENT OF REVENUE ADOPTING AN EMERGENCY RULE**

The Wisconsin Department of Revenue hereby adopts an emergency rule interpreting ss. 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats., relating to income and franchise tax deductions for job creation.

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***Analysis by the Department of Revenue***

**Statutes interpreted:** ss. 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats.

**Statutory authority:** ss. 71.05 (6) (b) 47m., 71.26 (1) (h), 71.45 (1) (c), and 227.24, Stats.

**Explanation of agency authority:** Sections 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats., require the department to promulgate rules to administer the job creation income and franchise tax deductions created by 2011 Wisconsin Act 5.

Section 227.24, Stats., provides an agency may promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements of the statutes if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

**Related statute or rule:** There are no other applicable statutes or rules.

**Plain language analysis:** This emergency rule clarifies certain terms as they apply to the job creation deduction under ss. 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats., prescribes the methods by which the average employee count is computed for purposes of determining the amount of the deduction, and clarifies how the deduction applies to partnerships, limited liability companies, tax-option corporations, and professional employer organizations.

**Summary of, and comparison with, existing or proposed federal regulation:**

There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the emergency rule.

**Comparison with rules in adjacent states:** The department has researched provisions in adjacent states and is not aware of the existence of a similar rule.

**Summary of factual data and analytical methodologies:** 2011 Wisconsin Act 5 created income and franchise tax deductions for job creation. Among the provisions created is a requirement for the department to promulgate rules to administer these deductions. The department has created this emergency rule order to comply with this statutory requirement.

**Analysis and supporting documents used to determine effect on small business:** As explained above, this emergency rule is created to administer changes in Wisconsin's income and franchise tax laws. As the rule itself does not impose any significant financial or other compliance burden, the department has determined that it does not have a significant effect on small business.

**Anticipated costs incurred by private sector:** This emergency rule does not have a significant fiscal effect on the private sector.

**Effect on small business:** This emergency rule does not have a significant effect on small business.

**Agency contact person:** Please contact Dale Kleven at (608) 266-8253 or dale.kleven@revenue.wi.gov, if you have any questions regarding this emergency rule.

**Place where comments are to be submitted and deadline for submission:** Comments may be submitted to the contact person shown below no later than one week after the public hearing on this emergency rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

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## FINDING OF EMERGENCY

The Department of Revenue finds that an emergency exists and that the attached rule order is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

The emergency rule is to reflect changes in Wisconsin's tax laws due to the creation of income and franchise tax deductions for job creation.

It is necessary to promulgate this rule order so that these deductions, created to help bring much needed jobs to Wisconsin, may be administered in a fair and consistent manner.

This rule is therefore promulgated as an emergency rule and shall take effect upon publication in the official state newspaper. Certified copies of this rule have been filed with the Legislative Reference Bureau, as provided in s. 227.24, Stats.

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**SECTION 1.** Tax 3.05 is created to read:

**Tax 3.05 Job creation deduction. (1)** PURPOSE. The purpose of this section is to clarify certain terms as they apply to the job creation deduction under ss. 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats.; define "employee," "full-time equivalent employee," and "gross receipts" ; prescribe the methods by which the average employee count is computed for purposes of determining the amount of the deduction; and clarify how the deduction applies to partnerships, limited liability companies, tax-option corporations, and professional employer organizations.

**(2)** DEFINITIONS. In this section and in ss. 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats.:

(a) "Commonly controlled group" has the meaning given in s. 71.255 (1) (c), Stats.

(b) "Employee" has the meaning given in section 3121 (d) of the Internal Revenue Code.

(c) "Full-time equivalent employee" means an employee who is a resident of this state, is employed in a regular, nonseasonal job, and who, as a condition of employment, is required to work at least 2,080 hours per year, including paid leave and holidays.

(d) "Gross receipts" means gross sales, gross premiums earned, gross dividends, gross interest income, gross rents, gross royalties, the gross sales price from the disposition of capital assets and business assets, gross income from pass-through entities, and all other receipts that are included in gross income, other than life insurance income, before apportionment for Wisconsin franchise or income tax purposes

(e) "Person" has the meaning given in ss. 71.01 (9), 71.22 (9), and 71.42 (4), Stats.

(f) "Related entity" has the meaning given in in ss. 71.01 (9am), 71.22 (9am), and 71.42 (4m), Stats.

(g) "Taxable year" has the meaning given in ss. 71.01 (12), 71.22 (10), and 71.42 (5), Stats.

**(3)** AMOUNT OF DEDUCTION. Sections 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats., provide for an income and franchise tax deduction in an amount equal to the increase in the number of full-time equivalent employees employed by the taxpayer in this state during the taxable year, multiplied by $4,000 for a business with gross receipts of no greater than $5,000,000 in the taxable year or $2,000 for a business with gross receipts greater than $5,000,000 in the taxable year.

**(4)** AVERAGE EMPLOYEE COUNT. The average employee count for purposes of determining the increase in the number of full-time equivalent employees employed by the taxpayer in this state for a taxable year shall be computed using one of the following methods:

(a) 1. Except as provided in subd. 2., for a taxable year during which the taxpayer is required, under ch. 108, Stats., to file quarterly unemployment insurance wage reports with the department of workforce development, the average employee count shall be computed using the average number of full-time equivalent employees employed by the taxpayer in this state from the claimant's quarterly wage reports required to be filed during the taxable year. An amount computed under this subdivision shall be rounded to the nearest whole number.

**Example:** For Taxpayer A's taxable year beginning August 1, 2011 and ending July 31, 2012, Taxpayer A uses the number of full-time equivalent (FTE) employees employed in Wisconsin from the quarterly wage reports required to be filed October 31, 2011, January 31, 2012, April 30, 2012, and July 31, 2012 to compute the average employee count. The information from the reports filed is as follows:

| **Report Due Date** | **Total Employees Reported** | **FTE Employees** |
|---|---|---|
| October 31, 2011 | 43 | 22 |
| January 31, 2012 | 58 | 36 |
| April 30, 2012 | 57 | 39 |
| July 31, 2012 | 71 | 63 |
| TOTAL | 229 | 160 |

The average employee count in this example is 40, the sum of the full-time equivalent employees employed in Wisconsin reported (160) divided by the number of reports filed (4).

2. If only one quarterly wage report is required to be filed during the taxable year, the average employee count shall be the number of full-time equivalent employees employed by the taxpayer in this state from that report.

3. For purposes of computing the average employee count under this paragraph, the number of full-time equivalent employees employed in this state does not include any employee who worked for a related person or related entity of the taxpayer or member of the same commonly controlled group as the taxpayer at any time during the 12 months prior to the due date of the quarterly wage report from which the number is derived.

(b) 1. Except as provided in subds. 2. and 3., for a taxable year during which a taxpayer is not required under ch. 108, Stats., to file quarterly unemployment insurance wage reports with the department of workforce development, the average employee count shall be computed using the average number of full-time equivalent employees employed by the taxpayer in this state on January 31, April 30, July 31, and October 31 within the taxable year. A January 31, April 30, July 31, or October 31 that does not occur within the taxable year is disregarded for purposes of the computation under this subdivision. An amount computed under this subdivision shall be rounded to the nearest whole number.

**Example 1)** For Taxpayer B's taxable year beginning July 1, 2011, and ending June 30, 2012, the number of full-time equivalent employees employed by Taxpayer B in this state on July 31, 2011, October 31, 2011, January 31, 2012, and April 30, 2012, are used to compute the average employee count.

**Example 2)** To compute the average employee count for Taxpayer C's short-period taxable year beginning March 15, 2011, and ending December 31, 2011, Taxpayer C divides the sum of the number of full-time equivalent employees employed by Taxpayer C in this state on April 30, 2011, July 31, 2011, and October 31, 2011, by three.

2. If only one of the dates, January 31, April 30, July 31, and October 31 occur within a taxable year, the average employee count shall be the number of full-time equivalent employees employed by the taxpayer in this state on that date.

3. If none of the dates January 31, April 30, July 31, or October 31, occurs within a taxable year, the average employee count shall be the number of full-time equivalent employees employed by the taxpayer in this state on the last day of the taxable year.

4. For purposes of computing the average employee count under this paragraph, the number of full-time equivalent employees employed in this state does not include any employee who worked for a related person or related entity of the taxpayer or member of the same commonly controlled group as the taxpayer at any time during the 12 months prior to the date on which the number is derived.

**(5)** PARTNERSHIPS, LIMITED LIABILITY COMPANIES, AND TAX-OPTION CORPORATIONS. Partnerships, limited liability companies, and tax-option corporations may not claim the job creation deduction under ss. 71.05 (6) (b) 47m., 71.26 (1) (h), or 71.45 (1) (c), Stats., but the eligibility for, and the amount of, the deduction are based on the increase in the number of full-time equivalent employees employed by the partnership, limited liability company, or tax-option corporation in this state and the gross receipts of the partnership, limited liability company, or tax-option corporation. A partnership, limited liability company, or tax-option corporation shall compute the amount of deduction that each of its partners, members, or shareholders may claim and shall provide that information to each of them.

**Example:** Partnership C has two equal partners, Individual D and Individual E. Individual D and Individual E are both Wisconsin residents. For its 2011 taxable year, Partnership C computes $450,000 of ordinary business income for federal income tax purposes and a job creation deduction of $40,000. Partnership C reports the following amounts to both Individual D and Individual E:

| | **Federal Amount** | | **Adjustment** | **Wisconsin Amount** |
|---|---|---|---|---|
| Ordinary business income | 225,000 | (20,000) | 205,000 | |

**(6)** PROFESSIONAL EMPLOYER ORGANIZATIONS. The provisions of s. 461.04 (4) (b), Stats., apply to this section and ss. 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats.

**Example:** Company F, a professional employer organization, hires Employee G to perform services in Wisconsin for Taxpayer H, a client of Company F. For purposes of determining the job creation deduction, Employee G is considered to be an employee solely of Taxpayer H.

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The rules contained in this order shall take effect upon publication in the official state newspaper as provided in s. 227.22 (2) (c), Stats.

DEPARTMENT OF REVENUE

Dated: _____ By: _____

Richard G. Chandler
Secretary of Revenue

E:Rules/305 Proposed Order (emergency – v4)