UPDATED VERSION*

OHIO LEGISLATIVE SERVICE COMMISSION

Final Analysis

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(As Passed by the General Assembly)

Reps. Ryan, Hambley, Hill, Carfagna, Goodman, Seitz, Schaffer, Lipps, Arndt, Green, Ginter, Slaby, Cupp, Dean, Reineke, Miller, Anielski, Antani, Antonio, Ashford, Barnes, Blessing, Brown, Craig, Duffey, Fedor, Galonski, Gavarone, Greenspan, Holmes, Howse, Hughes, T. Johnson, Kent, Kick, Koehler, Lanese, Lang, LaTourette, Leland, Lepore-Hagan, Manning, McColley, Merrin, O'Brien, Patterson, Patton, Pelanda, Perales, Rezabek, Riedel, Roegner, Rogers, Schuring, Sheehy, R. Smith, Sprague, Stein, Sweeney, West, Wiggam, Young

Sens. Terhar, Eklund, Beagle, Burke, Coley, Dolan, Gardner, Hackett, Hoagland, Hottinger, LaRose, Lehner, O'Brien, Oelslager, Peterson, Schiavoni, Sykes, Tavares, Thomas, Wilson, Yuko

Effective date: September 28, 2018

ACT SUMMARY

- Exempts from state and municipal income taxes any income received by an out-of-state disaster business or qualifying out-of-state employee for certain work repairing public utility or communications infrastructure damaged by a declared disaster during a defined period of time.

- Exempts from the commercial activity tax any gross receipts received by an out-of-state disaster business for repairing such infrastructure during such a period.

- Exempts from state and local use taxes the temporary use in Ohio of any equipment by an out-of-state disaster business to repair such infrastructure.

- Exempts from any state or local occupational licensing requirements certain out-of-state disaster businesses and qualifying out-of-state employees performing disaster work in Ohio during such a period.

* This version updates the effective date.

- Exempts from Ohio's workers' compensation and unemployment compensation laws out-of-state employees performing disaster work in Ohio during such a period.

- Provides that an out-of-state disaster business or out-of-state employee engaging in disaster work in Ohio during such a period is not required to file any business documents in Ohio before engaging in the disaster work.

- Modifies the calculation of the interest penalty imposed for the underpayment or nonpayment of estimated state income tax installments.

CONTENT AND OPERATION

Exemptions related to disaster work

The act authorizes state and local tax deductions and exemptions, payroll tax exemptions, and certain state and local regulatory exemptions for certain kinds of businesses and their employees that repair damage to public utility and communications property and equipment ("critical infrastructure") in Ohio caused by a disaster (referred to in the act as conducting "disaster work"). In order to qualify, the disaster needs to have been one for which the Governor or the President of the United States issued an emergency declaration. In general, exemptions and deductions authorized by the act apply only during a "disaster response period" – defined by the act to span from the tenth day before the emergency declaration through the sixtieth day after the declaration expires. Specifically, the act's deductions and exemptions apply to each of the following:

(1) A business with no Ohio operations in the preceding year, except those related to disaster work conducted during a disaster response period, that is formally solicited to conduct disaster work by the state, a political subdivision, or the owner or user of the infrastructure, e.g., a public utility (such a business is referred to in the act as an "out-of-state disaster business");

(2) An employee of an out-of-state disaster business who conducts disaster work during a disaster response period and who did no work in Ohio during the preceding year except disaster work during a disaster response period (hereafter, "solicited business's out-of-state employee");

(3) An employee of an owner or user of critical infrastructure who conducts disaster work during a disaster response period on the owner's or user's critical infrastructure and who did no work in Ohio during the preceding year, except disaster

work during a disaster response period (hereafter, "infrastructure owner's out-of-state employee").[1]

Tax deductions and exemptions

Income tax and commercial activity tax

The act authorizes state and municipal income tax and commercial activity tax (CAT) exemptions and deductions for out-of-state disaster businesses, solicited business' out-of-state employees, and infrastructure owners' out-of-state employees. The following table describes these exemptions and deductions in detail, arranged according to each such taxpayer and tax.

Tax	Out-of-state disaster business	Solicited business's out-of-state employee	Infrastructure owner's out-of-state employee
State income tax *R.C. 5747.01(A)(33)*	Deduction of income from solicited disaster work conducted during disaster response period. (Applies to owners of pass-through entity businesses.)	Deduction of income from solicited disaster work conducted during disaster response period.	Deduction of income from disaster work conducted on employer's critical infrastructure during disaster response period.
Municipal income tax *R.C. 718.01(C)(20), 718.05(G) and (H)*	Exempts income from solicited disaster work conducted during disaster response period. Exempts from requirement to file return solely to report such income.	Exempts income from solicited disaster work conducted during disaster response period. Exempts from requirement to file return solely to report such income.	Exempts income from disaster work conducted on employer's critical infrastructure during disaster response period. Exempts from requirement to file return solely to report such income.
CAT *R.C. 5751.01(F)(2)(ll)*	Exempts gross receipts from solicited disaster work conducted during disaster response period.	(Not applicable – employee compensation is not subject to the CAT.)	(Not applicable – employee compensation is not subject to the CAT.)

[1] R.C. 5703.94(A) and (B).

Use tax

In addition to the exemptions and deductions described above, the act exempts from state and local use tax the use of any equipment in Ohio by an out-of-state disaster business to conduct solicited disaster work during a disaster response period. The exemption applies only if the equipment is removed from Ohio by the last day of that period.[2]

Under the use tax law being amended by the act, the use of property in Ohio for business purposes, even temporarily, generally is taxable, subject to some exceptions. One exception is using property for which a sales tax, use tax, or similar tax has already been paid to another state or taxing jurisdiction: the Ohio tax applies only to the extent that Ohio's total state and local tax exceeds the other jurisdiction's tax. Another exception is for property that is to be incorporated into a public utility's production, transmission, transportation, or distribution system or that is to be used or consumed in rendering a public utility service; the use of such property is not taxable.[3] The act's exemption applies to the extent that these two exceptions would not apply to the use of equipment by out-of-state disaster businesses during a disaster response period.

Occupational licensing

Ohio law and some local governments regulate occupations and generally require certain businesses and individuals to have a license in order to pursue a particular line of business or occupation for compensation. The act exempts from state or local occupational licensing requirements an out-of-state disaster business or a solicited business's or infrastructure owner's out-of-state employee that is performing disaster work in Ohio during a disaster response period (see **COMMENT**, below, for potential municipal home rule implications).[4]

If an out-of-state employee were to engage in licensable work in Ohio other than disaster work, however, the employee would need to obtain an occupational license for that other work.

The act imposes requirements on the employers of out-of-state employees who are performing disaster work in Ohio during a disaster response period. Upon the request of the Secretary of State, for each solicited business's or infrastructure owner's out-of-state employee, the owner must provide proof of the employee's eligibility to

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[2] R.C. 5741.02(C)(10).

[3] R.C. 5739.02(B)(42)(a), 5741.01, and 5741.02.

[4] R.C. 4799.04(B) and 5703.94(B)(4).

perform disaster work. The proof must be demonstrated by the owner's books and records and must be submitted within the later of 30 days after receipt of the request or 30 days after the end of the disaster response period.[5]

Workers' compensation

Ohio's Workers' Compensation Law[6] generally covers employees who work in Ohio. There are certain exceptions to the coverage, however. The Workers' Compensation Law does not apply to employees employed outside of Ohio temporarily working in Ohio, unless the employees work in Ohio for more than 90 consecutive days.[7]

The act adds solicited business' and infrastructure owners' out-of-state employees to the list of individuals who are not considered "employees" for purpose of the Workers' Compensation Law.[8]

In other words, under the act, an employer is not required to, and may not elect to, pay Workers' Compensation premiums on an out-of-state employee who is conducting disaster work, and no other work, in Ohio, regardless of how long the employee is working in Ohio. Consequently, that out-of-state employee would not receive workers' compensation in Ohio in the event of an injury sustained or occupational disease contracted in the course of and arising out of the disaster work.

Unemployment

Like the Workers' Compensation Law, Ohio's Unemployment Compensation Law[9] generally covers individuals who work in Ohio. But, the Director of Job and Family Services may enter into a reciprocal agreement with another state by which that other state's unemployment compensation system is responsible for collecting contributions and paying benefits arising from specified services performed in Ohio. The act exempts a solicited business's or infrastructure owner's out-of-state employee from unemployment benefits in Ohio, with respect to any disaster work the employee performs in Ohio during a disaster response period, regardless of how long the employee is engaging in the disaster work, if Ohio has a reciprocal agreement with that other state. Specifically, it requires any reciprocal agreement between states under the

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[5] R.C. 4799.04(C).

[6] R.C. Chapters 4121., 4123., 4127., and 4131.

[7] Ohio Administrative Code 4123-17-23(C).

[8] R.C. 4123.01 and 5703.94(B)(3).

[9] R.C. Chapter 4141.

Unemployment Compensation Law to provide that an employer is not liable in Ohio for unemployment arising from disaster work performed during a disaster response period by that employee.[10]

As a result, such an employee responding to a disaster in Ohio would not be eligible to receive unemployment benefits in Ohio if the employee is later laid off from that position.

However, the employer may be subject to the full federal unemployment tax if that work is considered covered employment under federal law. Unemployment is administered through a federal-state partnership; an employer receives a significant tax credit on the employer's federal unemployment tax based on contributions the employers pay to an approved state system. However, if the employer does not pay contributions for a particular type of employment that is exempt under state law but is covered under the federal law, the employer pays the full federal unemployment tax for that employment.[11]

Business filing

The act exempts any disaster work performed by an out-of-state disaster business or a solicited business's or infrastructure owner's out-of-state employee from any business filing requirements under Ohio law. Business filing requirements can be found in Ohio's Corporate Law, for example, and require persons seeking to form a corporation in Ohio to first file documents with the Secretary of State.

Specifically, the act provides that no individual is required to file any business documents with the Secretary of State as a condition precedent to engaging in any of the following business activities in Ohio:

(1) Disaster work performed by an out-of-state disaster business;

(2) Disaster work performed by a solicited business's out-of-state employee;

(3) Disaster work performed by an infrastructure owner's out-of-state employee.[12]

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[10] R.C. 4141.42(C) and 5703.94(B)(3).

[11] 26 United States Code 3302, 3304, and 3306, and U.S. Department of Labor, Conformity Requirements for State UC Laws: Coverage, http://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_coverage.pdf.

[12] R.C. 1701.041 and 5703.94(B)(2), with conforming changes in R.C. 111.16 and 1329.01.

Administration

The act specifically empowers the Tax Commissioner to request information from an out-of-state disaster business or the employer of an employee eligible for the benefits described above. The Commissioner may request any information that generally serves to verify the business's or employee's eligibility for those benefits. For example, an out-of-state business may be required to furnish a copy of the solicitation it received to conduct disaster work in Ohio. An employer may be required to identify eligible employees and the date each employee began performing disaster work in Ohio. If the Commissioner makes such a request, the business or employer must respond within the later of 30 days after receipt of the request or 30 days after the end of the disaster response period.

The act authorizes the Department of Taxation to adopt any rules necessary to administer its various exemptions for disaster work by out-of-state businesses and their employees.[13]

Estimated income tax penalty

The act modifies how an interest penalty is calculated when a taxpayer underpays or fails to pay estimated state income tax installments.[14] Estimated income tax installments are required to be paid quarterly if an individual taxpayer's tax due for a year is estimated to be $500 or more (excluding taxes an employer withholds from the taxpayer's wages). Estimated payments also are due from pass-through entities if the entity files returns and pays taxes of at least $10,000 on behalf of certain of its owners who are nonresidents and who otherwise, but for their ownership of the entity, are not personally subject to the state's income tax.

Continuing law imposes an "interest penalty" if a taxpayer fails to pay the whole amount of estimated tax due each quarter. The penalty is computed by applying the statutory interest rate for tax underpayments, currently 4% annually, to the amount underpaid. However, the penalty is waived if an installment equals at least 90% of the current year's liability (when annualizing that quarter's income) or if the sum of all four installments equals at least 100% of the preceding year's liability, whichever is less. (In the case of a pass-through entity, the penalty also is waived if the sum of the quarterly installments equals at least 90% of the current year's liability.) These penalty waivers are known as the "safe harbor" provision for estimated taxes.

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[13] R.C. 5703.94(C) and (D).

[14] R.C. 5747.09 and 5747.43.

For taxpayers who do not meet the safe harbor provision, the act changes how the penalty imposed on the taxpayer's underpayment is to be calculated. Prior law required that the underpayment be computed in comparison to 90% of the taxpayer's actual liability for the current year. So, in each quarter, if the quarterly installment was less than 22.5% (one-quarter of 90%) of the current year's total liability, the penalty was applied to the difference.

Under the act, the underpayment is calculated in comparison to either 90% of the taxpayer's actual annual liability for the current year or 100% of the taxpayer's total liability for the preceding year, whichever is less. So, for each quarterly installment, the penalty is imposed on the difference between the quarterly installment paid and either (a) 22.5% of the current year's liability or (b) 25% of the preceding year's liability, whichever is less. Thus, if 25% of the preceding year's liability is less than 22.5% of the current year's, a taxpayer paying a quarterly installment of at least 25% of the preceding year's liability would not be penalized, even if the installment is less than 22.5% of the current year's liability.

The act's change results in Ohio law treating estimated tax payment penalties in a similar manner as such penalties are computed under federal law.[15] The change applies to taxable years that began or begin on or after January 1, 2017.[16] That date marks a change in the Department of Taxation's treatment of estimated income tax underpayment penalties, as reflected in the pertinent form instructions. Before that date, the calculation of underpayments was the same as it would be under the act's changes; after that date, the calculation of underpayments was as described for prior law, above.[17]

COMMENT

Under Article XVIII, Section 3 of the Ohio Constitution, municipal corporations "have the authority to exercise all powers of local self-government and adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws." Accordingly, a statute enacted by the General Assembly that purports to limit that constitutional authority, such as by preempting any local occupational licensing requirements, raises questions under this provision. See *Canton v. State*, 2002-Ohio-2005, 95 Ohio St.3d 149.

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[15] 26 U.S.C. 6654.

[16] Section 3.

[17] See Department of Taxation tax alert, https://www.tax.ohio.gov/Portals/0/OhioTaxAlert/ArchivedAlerts/PassThroughEntityandFiduciaryIncomeTaxReturns.pdf.

HISTORY

ACTION	DATE
Introduced	03-16-17
Reported, H. Public Utilities	06-21-17
Passed House (97-0)	09-13-17
Reported, S. Ways & Means	05-16-18
Passed Senate (32-0)	05-16-18
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