

CHAPTER XXI OF THE REGULATIONS OF THE COMMISSIONER OF ECONOMIC DEVELOPMENT IS  
HEREBY ADDED AS FOLLOWS:

## Chapter XXI EMPIRE STATE JOBS RETENTION PROGRAM

### Part 210 Purpose and Definitions

#### § 210.1 Purpose and general description.

(a) The purpose of these regulations is to set forth the administrative process governing the Empire State Jobs Retention Program ("Program") and specifically to establish an application process, standards for application evaluation and procedures for businesses claiming the tax credit under this program. Chapter 56 of the Laws of 2011 establishes the program and grants the Commissioner of the Department of Economic Development the authority to promulgate regulations to establish procedures for the allocation of the Empire State Jobs Retention Program tax credit.

#### § 210.2 Definitions.

As used in this regulation, the following terms shall have the following meanings:

(a) "Agriculture" means both agricultural production (establishments performing the complete farm or ranch operation, such as farm owner-operators, tenant farm operators, and sharecroppers) and agricultural support (establishments that perform one or more activities

associated with farm operation, such as soil preparation, planting, harvesting, and management, on a contract or fee basis).

(b) "Back office operations" means a business function that may include one or more of the following activities: customer service, information technology and data processing, human resources, accounting and related administrative functions.

(c) "Certificate of eligibility" means the document issued by the department to an applicant that has completed an application to be admitted into the empire state jobs retention program and has been accepted into the program by the department. Possession of a certificate of eligibility does not by itself guarantee the eligibility to claim the tax credit.

(d) "Certificate of tax credit" means the document issued to a participant by the department, after the department has verified that the participant has met all applicable eligibility criteria in this article. The certificate shall be issued annually if such criteria are satisfied and shall specify the exact amount of the tax credit under this article that a participant may claim, pursuant to part 213.1 of this title, and shall specify the taxable year in which such credit may be claimed.

(e) "Distribution center" means a large scale facility involving processing, repackaging and/or movement of finished or semi-finished goods to retail locations across a multi-state area.

(f) "Financial services data centers" or "financial services customer back office operations" means operations that manage the data or accounts of existing customers or provide product or service information and support to customers of financial services companies, including banks, other lenders, securities and commodities brokers and dealers, investment banks, portfolio managers, trust offices, and insurance companies.

(g) "Full-time equivalent jobs" means any combination of two or more part-time jobs that, when combined together, constitute the equivalent of a job of at least 35 hours per week.

(h) "Impacted jobs" means jobs existing at a business enterprise at a location or locations within the county declared an emergency by the governor on the day immediately preceding the day on which the event leading to the emergency declaration by the governor occurred.

(i) "Manufacturing" means the process of working raw materials into products suitable for use or which gives new shapes, new quality or new combinations to matter which has already gone through some artificial process by the use of machinery, tools, appliances, or other similar equipment. "Manufacturing" does not include an operation that involves only the assembly of components, provided, however, the assembly of motor vehicles or other high value-added products shall be considered manufacturing.

(j) "Participant" means a business entity that:

(1) has completed an application prescribed by the department to be admitted into the program;

(2) has been issued a certificate of eligibility by the department;

(3) has demonstrated that it meets the eligibility criteria in part 211.2 of this title and the requirements in part 211.1 (c) of this title; and

(4) has been certified as a participant by the commissioner.

(k) "Preliminary schedule of benefits" means the maximum aggregate amount of the tax credit that a participant in the empire state jobs retention program is eligible to receive pursuant to this title. The schedule shall indicate the annual amount of the credit a participant may claim in each of its ten years of eligibility. The preliminary schedule of benefits shall be issued by the

department when the department approves the application for admission into the program.

The commissioner may amend that schedule, provided that the commissioner complies with the credit caps in section three hundred fifty-nine of the economic development law.

(l) "Related person" means a related person pursuant to subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code.

(m) "Scientific research and development" means conducting research and experimental development in the physical, engineering, and life sciences, including but not limited to agriculture, electronics, environmental, biology, botany, biotechnology, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, veterinary, and other allied subjects. For the purposes of this article, scientific research and development does not include medical or veterinary laboratory testing facilities.

(n) "Significant capital investment" means generally the costs relating to extensive renovations to an existing facility and/or the purchase of a substantial amount of new machinery and equipment, or purchase or construction of a new facility. Evidence of a significant capital investment may be (1) a new capital investment with a basis for federal income tax purposes at the time of completion that exceeds the sum of the applicant's total New York State capital investments over the past three tax years; or (2) a major expansion or upgrade of an existing facility resulting in additional production capacity or increased energy or production efficiency increasing the applicant's profitability, long-term viability, and commitment to operations in New York State. Land acquisition, site development and moving and relocation costs may be taken into account in determining whether an investment in a new

facility is a significant capital investment. Only costs in excess of any insurance proceeds received as a result of the losses will be considered for determining whether a significant capital investment has been made.

(o) "Software development" means the creation of coded computer instructions and includes new media as defined by the commissioner in regulations.

(p) "Substantial physical damage and economic harm" means the loss of ability to continue operations at the location(s) within the county in which an emergency was declared by the Governor after January 1, 2011 without incurring significant capital investment to repair an existing building or buildings, machinery or equipment or to purchase a new building or buildings, machinery or equipment, or to construct a new facility.

(q) "Smart growth" means the sensible, planned, efficient growth that integrates economic development and job creation with community quality-of-life by preserving and enhancing the built and natural environments. Smart growth encourages growth in developed areas with existing infrastructure to sustain it, particularly municipal centers, downtowns, urban cores, historic districts and older first-tier suburbs.

## Part 211 Application and Review Process

### § 211.1 Application and review process.

- (a) An applicant must submit a complete application as prescribed by the Commissioner.
- (b) Such completed application must be submitted to the commissioner within (1) one hundred eighty days of the declaration of an emergency by the governor in the county in which the business enterprise is located or (2) one hundred eighty days of the enactment of Chapter 56 of the Laws of 2011, if such date is later than the date specified in (1) above.
- (c) As part of such application, an applicant must:
- (1) agree to allow the Department of Taxation and Finance to share its tax information with the Department. Note that the form created by the Department to effectuate this information transfer may only be executed by a person with authority to act on the business entity's behalf in this regard. However, any information shared as a result of this agreement shall not be available for disclosure or inspection under the state freedom of information law; and
  - (2) agree to allow the Department of Labor to share its tax and employer information with the Department. Note that the form created by the Department to effectuate this

information transfer may only be executed by a person with authority to act on the business entity's behalf in this regard. However, any information shared as a result of this agreement shall not be available for disclosure or inspection under the state freedom of information law; and

(3) allow the Department and its agents access to any and all books and records deemed relevant by the Department to monitor compliance with the provisions of Article 20 of the Economic Development Law; and

(4) agree to be permanently disqualified for empire zone benefits at any location or locations that qualify for empire state jobs retention benefits if admitted into the empire state jobs retention program for such location or locations; and

(5) provide, upon request by the Department, all of the following information:

- (i) a plan outlining the schedule for meeting the jobs retention requirements as set forth in section 211.2 (c) of this title (such plan must include details on job titles and expected salaries);
- (ii) the prior three years of federal and state income or franchise tax returns, unemployment insurance quarterly returns, real property tax bills and audited financial statements; and
- (iii) the employer identification or social security numbers for all related persons to the applicant, including those of any members of a limited liability company or partners in a partnership.

(6) provide a clear and detailed presentation of all related persons to the applicant to assure the Department that jobs are not being shifted within the state; and

(7) certify, under penalty of perjury, that it is in substantial compliance with all environmental, worker protection, and local, state, and federal tax laws.

(d) The Commissioner, upon receipt of a complete application from an applicant, shall determine whether the applicant meets the eligibility criteria set forth in section 211.2 of this part. An applicant that does not meet the eligibility criteria set forth in section 211.2 of this part shall not be accepted into the Program.

(e) Having determined that an application is complete and that the applicant meets the eligibility criteria set forth in section 211.2 of this part, the Department may admit the applicant into the program and issue a certificate of eligibility as defined in section 210.2(c) of this Title and a preliminary schedule of benefits as defined in section 210.2(k) of this title by year based on the applicant's projections as set forth in its application. This preliminary schedule of benefits delineates the maximum possible benefits an applicant may receive under this program but the Commissioner may amend a preliminary schedule of benefits provided that the Commissioner complies with the credit caps in section 359 of the Economic Development Law.

#### § 211.2 Eligibility criteria.

(a) To be a participant in the Empire State Jobs Retention Program, an applicant must be operating predominantly in a strategic industry as defined in subdivision (b) of this section and meet the job retention requirements for strategic industries as outlined in subdivision (c) of this section. When determining whether an applicant is operating predominantly in a strategic

industry the Commissioner will examine the nature of the business activity at the location for the proposed project and will make eligibility determinations based on such activity.

(b) Strategic industries shall consist of the following: (1) financial services data center or a financial services back office operation; (2) manufacturing; (3) software development and new media; (4) scientific research and development; (5) agriculture; (6) the creation or expansion of back office operations in the state; or (7) distribution center.

(c) In order to participate in the empire state jobs retention program, a business entity operating in one of the strategic industries listed in subdivision (b) of this section, (1) must be located in a county in which an emergency has been declared by the governor on or after January first, two thousand eleven, (2) must demonstrate substantial physical damage and economic harm resulting from the event leading to the emergency declaration by the governor, and (3) must have had at least one hundred full-time equivalent jobs in the county in which an emergency has been declared by the governor on the day immediately preceding the day on which the event leading to the emergency declaration by the governor occurred, and must retain or exceed that number of jobs in New York state. Jobs impacted in a county in which an emergency has been declared by the governor on or after January first, two thousand eleven but not retained by a participant are not eligible for the jobs retention tax credit.

(d) A business entity must be in substantial compliance with all worker protection and environmental laws and regulations. In addition, a business entity may not owe past due state taxes. In addition, a business entity must not owe local property taxes for any year prior to the

year in which it applies to participate in the empire state jobs retention program; provided, however, in the case of a tax certiorari proceeding, a business entity would not be considered in arrears until a final decision is made with respect to such proceeding.

(e) A not-for-profit business entity, a business entity whose primary function is the provision of services including personal services, business services, or the provision of utilities, a business entity engaged predominantly in the retail or entertainment industry, and a business entity engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity are not eligible to participate in the program.

#### § 211.3 Evaluation standards

(a) The evaluation standards which may be utilized by the Commissioner when determining whether to admit an applicant to the program include the following:

(1) whether the applicant is proposing to substantially renovate contaminated, abandoned or underutilized facilities; or

(2) whether the applicant will use energy-efficient measures, including, but not limited to, the reduction of greenhouse gas and emissions and the Leadership in Energy and Environmental Design (LEED) green building rating system for the project identified in its application; or

(3) the degree of economic distress in the area where the applicant will locate the project identified in its application; or

- (4) the degree of applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or
- (5) the degree to which the project identified in the application supports New York State's minority and women business enterprises; or
- (6) the degree to which the project identified in the application supports the principles of Smart Growth as defined in section 210.2(q) of this Title; or
- (7) the estimated return on investment that the project identified in the application will provide to the State; or
- (8) the overall economic impact that the project identified in the application will have on a region, including, but not limited to, the impact of any direct and indirect jobs that will be retained or created; or
- (9) the degree to which other state or local incentive programs are available to the applicant; or
- (10) the likelihood that the project identified in the application would be located outside of New York State or would not occur but for the availability of state or local incentives; or
- (11) the recommendation of the relevant regional economic development council or the commissioner's determination that the proposed project aligns with the regional strategic priorities of the respective region.

## Part 212 Claiming credits

### § 212.1 Claiming credits.

(a) A participant must submit evidence of retaining impacted jobs to the Department in order to receive benefits under the program.

(b) Such evidence may include, but not be limited to, submission of the NYS-45 form. This evidence will serve to demonstrate that the participant has satisfied all applicable eligibility requirements and form the basis for the jobs retention tax credit.

(c) If a participant fails to demonstrate that it has satisfied the eligibility requirements set forth in section 211.2 of this Title, the Department shall not issue such participant a certificate of tax credit.

(d) After reviewing such evidence and finding it sufficient, the Department shall calculate the appropriate amount of tax credit and issue a certificate of tax credit for one taxable year. The certificate shall specify the exact amount of the job retention tax credit that a participant may claim under this program, and shall specify the taxable year in which such credit may be claimed. The tax credit can only be claimed on tax returns for the tax year indicated on the certificate. If the participant is a business entity that passes through the tax credit to its owners (such as partners in a partnership or members in a limited liability company), such owners can only claim their share of the tax credit on the tax return that corresponds to the tax year indicated on the certificate issued to the participant. In order to receive a certificate of tax

credit for subsequent taxable years, the participant must submit to the Department a performance report demonstrating that the participant continues to satisfy the eligibility criteria specified in section 211.2 of this title.

Part 213 Calculation of the tax credits.

§ 213.1 Calculation of the tax credits

(a) The Department shall calculate the amount of empire state jobs retention program credit for which the participant is eligible pursuant to section 211.2 of this title.

(b) A participant in the Program shall be eligible to claim a credit for retention of the impacted jobs. The amount of such credit per job shall be equal to the product of gross wages and 6.85 percent.

§ 213.2 Refundability of credits.

(a) The empire state jobs retention program credit established in this section shall be refundable as provided in the Tax Law. If a participant fails to satisfy the eligibility criteria in any one year, it will lose the ability to claim credit for that year.

(b) The event of such failure shall not extend the original ten-year eligibility period.

(c) The business enterprise shall be allowed to claim the credit as prescribed in section thirty-six of the tax law; provided, however, a business enterprise shall not be allowed to claim the credit prior to tax year two thousand twelve.

(d) A participant may be eligible for benefits under this article as well as article seventeen of the economic development law, provided the participant can only receive benefits pursuant to subdivision two of section three hundred fifty-five of the economic development law for costs in excess of costs recovered by insurance.

#### Part 214 Record Retention and Reporting requirements

##### § 214.1 Record retention.

(a) Each participant shall keep all relevant records for their duration of program participation plus three years.

(b) The Department shall have the right to inspect all relevant records upon reasonable notice to the Participant.

##### § 214.2 Reporting.

(a) Each participant must submit a performance report annually, in such form as the commissioner may require within thirty days of the end of its taxable year.

(b) The Commissioner shall prepare on a quarterly basis a program report for posting on the Department's website. The first report will be due June thirtieth, two thousand thirteen, and every three months thereafter. Such report shall include, but not be limited to, the following information: number of applicants; number of participants approved; names of participants; total amount of benefits certified; benefits received per participant; total number of retained jobs and such other information as the Commissioner determines necessary.

#### Part 215 Removal from Program

##### § 215.1 Removal from program.

(a) The Commissioner shall remove any participant from the program for failing to meet any of the requirements set forth in section 211.1(c) of this Title, or for failing to meet the requirements set forth in section 211.2(c) or 211.2(d) of this Title.

(b) If the Commissioner has removed the participant from the program pursuant to subdivision (a) of this section, the Commissioner shall notify the participant of such removal in writing. Such notice of removal shall explain the reason or reasons for the removal from the program. The notice of removal shall state the effective date of removal, and advise the participant that it may appeal the removal in accordance with Part 216 of this Title. Such notice may be served by the Department on the participant by certified, registered or overnight mail sent to the participant at the address last provided to the Department by the participant.

## Part 216 Appeal Procedures

### §216.1 Applicability.

(a) This part shall apply to all appeals taken as a result of a participant being removed from the program pursuant to section 215.1(a) of this Title.

### § 216.2 Designation of Appeal Officers.

The Commissioner may designate any impartial person or persons to act as an appeal officer.

### § 216.3 Notice of Appeal.

(a) A participant that received a notice of removal pursuant to section 215.1(b) of this Title may send a written notice ("Notice of Appeal") to the Commissioner appealing the removal by no later than thirty (30) days from the date of the mailing of the Notice. Failure by a participant to appeal the Commissioner's denial or removal of certification within the aforementioned thirty (30) day period will be deemed a waiver of the participant's right to an appeal.

(b) The Notice of Appeal must contain specific factual information and documentation supporting the basis for the appeal and all legal arguments that are the basis for the participant's challenge to the removal.

(c) All Notice of Appeals must be sent to the name and address indicated on the Notice of Removal.

(d) Counsel to the Department may file a response to the Notice of Appeal with the appeal officer. Any response should address the factual and legal allegations contained in the Notice of Appeal. A copy of the response shall be sent to the participant, or to the attorney representing the participant.

#### § 216.4 Authority of Appeal Officer.

(a) The appeal officer shall evaluate the merits of the appeal and any response from counsel to the Department. Where the appeal officer deems it appropriate, the appeal officer may require the participant or counsel to the Department to address additional issues and/or submit additional information regarding the appeal. If the appeal officer requires submission of additional documents by either participant or counsel to the Department, both parties shall receive copies of all submissions.

(b) Nothing herein shall preclude the appeal officer from obtaining information from any outside source, as he or she deems appropriate.

(c) The appeal officer shall determine whether he or she deems it necessary to conduct a fact-finding hearing, and the level of formality of any hearing conducted.

#### § 216.5 Appeal Officer's Report.

(a) The appeal officer shall prepare a report and make recommendations to the Commissioner. The recommendations may be in the form of a proposed decision which will contain findings of

fact and conclusions of law. This report, along with the entire record, shall be transmitted to the Commissioner, the counsel to the Department, and the business entity that filed the appeal.

§ 216.6 Appeal Decision.

(a) After receipt of the appeal officer's report, the Commissioner will issue a final determination and serve a copy on the participant or its representative and the Commissioner of the Department of Taxation and Finance. If the Commissioner issues a final determination that includes findings of fact or conclusions of law that conflict with the recommendations of the appeal officer, the determination shall set forth the reasons therefore.