

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-05

Date issued: February 24, 1994

Requested by: Robert Hanson, State Tax Commissioner

- QUESTION PRESENTED -

Whether the new jobs credit from income tax withholding, which a business may use to repay a community economic development loan for a new jobs training program, applies only to the initial employee in the new job.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the new jobs credit from income tax withholding, which is applied to repay a new jobs training program as part of a community economic development loan to a new or expanding business, may be applied to any employee who is employed in a new job the training for which is the subject of the economic development program.

- ANALYSIS -

The 1993 Legislative Assembly passed an act "to assist community economic development by providing incentive to businesses to locate and expand within the state through government assisted new jobs training." 1993 N.D. Sess. Laws ch. 493¹. Job Service North Dakota is to develop and coordinate training and education specifically directed to new jobs for businesses which are eligible for loans or grants under the act. 1993 N.D. Sess. Laws ch. 493, ? 2. Loans under the act may be repaid by crediting the North Dakota income tax withholding on the wages of each employee participating in the project against the loan. 1993 N.D. Sess. Laws ch. 493, ? 3(2).

¹Codified as a note to N.D.C.C. ? 57-38-59.

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The State Tax Commissioner and the State Treasurer administer the new jobs credit from income tax withholding and each may adopt rules for its administration. 1993 N.D. Sess. Laws ch. 493, § 3(5). For the purpose of implementing the act, the Tax Department has proposed an administrative rule which defines an employee who is qualified for the new jobs credit from income tax withholding as "an individual initially employed in a new job." Proposed Rule (P.R.) 81-03-03.2-03(1).

Under the act, the term "employee" is defined as "the individual employed in a new job." 1993 N.D. Sess. Laws ch. 493, § 1(6). "New job" means a job in a new or expanding primary sector business. 1993 N.D. Sess. Laws ch. 493, § 1(8). The new jobs credit from withholding is outlined in section 3 of the act. 1993 N.D. Sess. Laws ch. 493, § 1(9). The new jobs credit from withholding is based upon the wages paid to the new employees and consists of a credit equal to the withholding payment made by the employer under N.D.C.C. § 57-38-60. 1993 N.D. Sess. Laws ch. 493, § 3(2). Specifically, this is the proportional "amount required to be deducted by an employer from the wages of an employee . . . as will approximate the income taxes due the state." N.D.C.C. § 57-38-59(1), referenced at N.D.C.C. § 57-38-60(1). This amount is to be transmitted to the Department of Economic Development and Finance, the city, county, or other local development group, or both, as the case may be, who provided loans under the act. Id. When the principal and the interest on these loans have been repaid through the new jobs credit from withholding, the amounts which the employer withholds pursuant to N.D.C.C. § 57-38-60 are applied to the general fund of the state in the normal manner. Id.

The Tax Department's proposed rule 81-03-03.2-03(1) is based in part on the proposition that the new jobs credit from income tax withholding may only be applied to the initial employee in the new job and not to an employee who is subsequently hired after the initial employee leaves employment in the new job. In support of this proposition, the Commissioner cites the definition for new job which excludes replacement workers. See 1993 N.D. Sess. Laws ch. 493, § 1(8). The exclusion of replacement workers must be construed in context. "Words and phrases should not be isolated and defined out of context, but will be construed in connection with the statute in which they are used." Balliet v. North Dakota Workers Compensation Bureau, 297 N.W.2d 791,

795 (N.D. 1980). "The meaning of a word in a given sentence or clause may be affected not only by the context, but also by the subject to which it is applied." Matter of Estate of Knudsen, 342 N.W.2d 387, 390 (N.D. 1984), quoting Thielen v. Kostelecky, 287 N.W. 513, 516 (N.D. 1939). The full context of the definition of "new job" is:

"New job" means a job in a new or expanding primary sector business. The term does not include recalled workers returning to positions they previously held, replacement workers, including workers newly hired as a result of a labor dispute, or other jobs that formerly existed within the employment of the employer in the state.

1993 N.D. Sess. Laws ch. 493, § 1(8). In this context, a new job is initially defined as a job in a new or expanding primary sector business. The class of jobs to which the term "new job" does not apply consists of "jobs that formerly existed within the employment of the employer in the state" with specific examples being "recalled workers returning to positions they previously held, and replacement workers, including workers newly hired as a result of a labor dispute."

"Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language." N.D.C.C. § 1-02-03. In the exclusion within the definition, the word "other" in the phrase "other jobs that formerly existed within the employment of the employer in the state" requires a conclusion that the two prior phrases in the sentence also refer only to jobs which formerly existed with the employer. In this context, the term "replacement worker" means a new worker holding a job which preexisted the jobs training project. It is my opinion that the exclusion of replacement workers in the definition of "new job" does not limit the interpretation of "new employee" to only the initial employee hired to fill a job for which training was provided under the new jobs training program.

The act provides that the "[n]ew jobs credit from withholding must be based upon the wages paid to the new employees." The term "employee" is defined in the act; however, except for the limitation on training costs in section 2, the act refers to "new employees" or to "new employees participating in the project" or to "every employee participating in the new jobs training program." Further the "income tax withholding on

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wages paid by the employer to each new employee participating in a project must be credited from the withholding payments made by the employer pursuant to section 57-38-60." 1993 N.D. Sess. Laws ch. 493, ? 3. Other provisions of the act include a requirement that "every employee participating in the new jobs training program must be paid an income at least equal to one hundred twenty percent of the federal poverty level for a family of four as determined at the date of the commencement of the project, for the life of the loan." 1993 N.D. Sess. Laws ch. 493, ? 2. Because the act defines employee as the individual employed in the new job, without further limitation, it is the definition of new job which controls the breadth of the jobs credit withholding. Under the act the job withholding credit follows the "new job" and not the employee hired to fill the job.

Reading the provisions of the act together it is evident that the phrases "new employee," "new employee participating in a project," and "every employee participating in the new jobs training program" are used interchangeably. Therefore, it is my opinion that an employee "participates" in the project or the new jobs training program by filling a job position for which training was provided under the jobs training loan program provided pursuant to 1993 N.D. Sess. Laws ch. 493. Further, there is no language within the act which suggests that the intent was to limit the tax withholding credit to tax withholding from wages of only the employee initially holding the new job. Therefore, it is my opinion that the provisions which relate to employees relate equally to each employee hired to fill the new job position during the life of the loan.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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