STATE OF NEW YORK

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2019-2020 Regular Sessions

IN SENATE

(Prefiled)

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Introduced by Sen. KENNEDY -- read twice and ordered printed, and when printed to be committed to the Committee on Commerce, Economic Development and Small Business

AN ACT to amend the economic development law and the tax law, in relation to establishing the capital investment jobs retention program

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The economic development law is amended by adding a new article 23 to read as follows:

ARTICLE 23
CAPITAL INVESTMENT JOBS RETENTION PROGRAM
Section 450. Short title.
451. Definitions.
452. Eligibility criteria.
453. Application and approval process.
454. Capital investment jobs retention program credit.
455. Powers and duties of the commissioner.
456. Maintenance of records.
457. Reporting.
458. Cap on tax credit.
459. Penalties.

§ 450. Short title. This article shall be known and may be cited as the "capital investment jobs retention program".

§ 451. Definitions. For the purposes of this article:

1. "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).

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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2. "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.

3. "Certificate of eligibility" means the document issued by the department to an applicant that has completed an application to be admitted into the capital investment 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.

4. "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 each tax credit under this article that a participant may claim, pursuant to section four hundred fifty-four of this article, and shall specify the taxable year in which such credit may be claimed.

5. "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.

6. "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.

7. "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.

8. "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.

9. "Participant" means a business entity that:

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

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

(c) has demonstrated that it meets the eligibility criteria in section four hundred fifty-two and subdivision two of section four hundred fifty-three of this article; and

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

10. "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 article. 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 commission-

er may amend that schedule, provided that the commissioner complies with the credit caps in section three hundred fifty-nine of this chapter.

11. "Project site" means a single location from which operations are conducted and manufacturers may designate multiple locations consisting of one or more integrated buildings or structures within a fifteen-mile radius as one project site.

12. "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.

13. "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.

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

§ 452. Eligibility criteria. 1. To be a participant in the capital investment jobs retention program, a business entity shall:

(a) operate in New York state predominantly:

(i) as a financial services data center or a financial services back office operation;

(ii) in manufacturing;

(iii) in software development and new media;

(iv) in scientific research and development;

(v) in agriculture;

(vi) in the creation or expansion of back office operations in the state; or

(vii) in a distribution center.

(b) invest at least fifty million dollars in fixed assets for manufacturing operations or twenty million in fixed assets for significant corporate administrative functions at the project site. Such investment shall be completed within the three consecutive calendar years preceding the taxable year in which such participant first claims the tax credit set forth in this article. In calculating such investment, the participant may not include:

(i) payments made for the acquisition of personal property through operating leases,

(ii) payments made to related members, including, but not limited to related entities, component members, or persons to or from whom there is attribution of stock ownership,

(iii) elected consolidated taxpayers, or

(iv) persons treated as single taxpayers known as combined taxpayers.

(c) agree to maintain operations at the project site for at least the greater of:

(i) the term of the tax credit plus three years, or

(ii) seven years.

(d) demonstrate to the commissioner that:

(i) it is economically sound and possesses the financial capability to complete the required capital investment, and

(ii) the tax credit provided for in this article is a major factor in its determination to begin, continue and complete the capital investment project.

(e) provide the commissioner with a letter of support from the local community in which the project is located.

2. When determining whether an applicant is operating predominantly in one of the industries listed in subdivision one of this section, the commissioner shall examine the nature of the business activity at the location for the proposed project and will make eligibility determinations based on such activity.

3. For the purposes of this article, in order to participate in the capital investment jobs retention program, a business entity operating in one of the strategic industries listed in subdivision one of this section:

(a) shall employ at least two hundred full-time equivalent jobs at the project site during the time for which the tax credit is granted, and

(b) shall continue to employ at least two hundred full-time equivalent employees for the duration of the agreement entered into with the empire state development corporation; provided, however, that the business entity shall not include full-time equivalent positions whose existence are predicated upon the assistance offered by the tax credit.

4. An intrastate relocation project, 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, or a company 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 receive the tax credit described in this article.

5. A business entity must be in 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 capital investment jobs retention program.

§ 453. Application and approval process. 1. A business enterprise shall submit a completed application as prescribed by the commissioner. Such completed application shall be submitted to the commissioner within one hundred eighty days of the enactment of this article.

2. As part of such application, each business enterprise shall:

(a) agree to allow the department of taxation and finance to share its tax information with the department. 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.

(b) agree to allow the department of labor to share its tax and employer information with the department. 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.

(c) allow the department and its agents access to any and all books and records the department may require to monitor compliance.

(d) agree to be permanently disqualified for empire zone tax benefits at any location or locations that qualify for capital investment jobs retention program benefits if admitted into the capital investment jobs retention program.

(e) provide the following information to the department upon request:

(i) a plan outlining the schedule for meeting the jobs retention requirements as set forth in subdivision three of section four hundred fifty-two of this article. Such plan must include details on jobs 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.

(f) 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.

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

3. After reviewing a business enterprise's completed application and determining that the business enterprise will meet the conditions set forth in subdivision three of section four hundred fifty-two of this article, the department may admit the applicant into the program and provide the applicant with a certificate of eligibility and a preliminary schedule of benefits 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.

4. In order to become a participant in the program, an applicant shall submit evidence that it satisfies the eligibility criteria specified in section four hundred fifty-two of this article and subdivision two of this section in such form as the commissioner may prescribe. After reviewing such evidence and finding it sufficient, the department shall certify the applicant as a participant and issue to that participant a certificate of tax credit for one taxable year. 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 four hundred fifty-two of this article and subdivision two of this section.

5. A participant may claim tax benefits commencing in the first taxable year that the business enterprise receives a certificate of tax credit or the first taxable year listed on its preliminary schedule of benefits, whichever is later. A participant may claim such benefits for the next nine consecutive taxable years, provided that the participant demonstrates to the department that it continues to satisfy the eligibility criteria specified in section four hundred fifty-two of this article and subdivision two of this section in each of those taxable years.

§ 454. Capital investment jobs retention program credit. 1. A participant in the capital investment jobs retention program shall be eligible to claim a credit for the impacted jobs. The amount of such credit shall be equal to seventy-five percent of the New York state income taxes withheld from eligible full-time employees.

2. The tax 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. The event of such failure shall not extend the original ten-year eligibility period.

3. (a) The business enterprise shall be allowed to claim the credit as prescribed in section forty-four of the tax law; provided, however, a business enterprise shall not be allowed to claim the credit prior to tax year two thousand twenty-one.

(b) Any individual that is a member or employee of a participant may claim the pro rata share of the credit earned by such participant.

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

§ 455. Powers and duties of the commissioner. 1. The commissioner shall promulgate regulations establishing an application process and eligibility criteria, that will be applied consistent with the purposes of this article, so as not to exceed the annual cap on tax credits set forth in section three hundred fifty-nine of this chapter which, notwithstanding any provisions to the contrary in the state administrative procedure act, may be adopted on an emergency basis. Such regulations shall include, but not be limited to, criteria for determining whether a business entity is economically sound and possesses the financial capability to complete the required capital investment and whether the tax credit provided for in this article is a major factor in the determination of such business entity to begin, continue and complete the capital investment project.

2. The commissioner shall, in consultation with the department of taxation and finance, develop a certificate of tax credit that shall be issued by the commissioner to participants. Participants may be required by the commissioner of taxation and finance to include the certificate of tax credit with their tax return to receive any tax benefits under this article.

3. The commissioner shall solely determine the eligibility of any applicant applying for entry into the program and shall remove any participant from the program for failing to meet any of the requirements set forth in subdivision two of section four hundred fifty-three of this article, or for failing to meet the job retention requirements set forth in subdivision three of section four hundred fifty-two of this article, or for failing to meet the requirements of subdivision five of section four hundred fifty-two of this article.

§ 456. Maintenance of records. Each participant shall keep all relevant records for the duration of its program participation plus three years.

§ 457. Reporting. 1. (a) In order to receive a tax credit certificate and to maintain eligibility for this tax credit program, the taxpayer must submit an annual report to the department of taxation and finance by March first of the year following any year for which the tax credit is claimed, the first report of which is due March first of the year following the calendar year in which the investment is completed and the tax credit begins.

(b) Such report shall contain the number of eligible full-time equivalent employees and the amount of income tax withheld from those employees, and the amounts paid towards the completion of the capital investment. Once this is verified by the commissioner of taxation and finance, the commissioner will issue a tax credit certificate to the taxpayer.

(c) The participant must then submit the tax credit certificate with the applicable state tax return. If the tax credit is greater than the state tax liability, the unused portion may be carried forward up to three years.

(d) Failure to submit a complete and timely annual report will result in the assessment of a five hundred dollar late fee for each ensuing calendar month the report remains incomplete or unfiled.

(e) Once the active term of the tax credit ends, a post-term period, length to be determined by the empire state development corporation, will require annual reporting requirements to certify that substantial operations remain at the project site.

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

3. 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 twenty-two, and every three months thereafter. Such report shall include, but not be limited to, the following: 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.

§ 458. Cap on tax credit. 1. The total amount of tax credits listed on certificates of tax credit issued by the commissioner for any taxable year may not exceed the following amounts:

(a) For 2021, eighteen million dollars.

(b) For 2022, twenty-three million dollars.

(c) For 2023, twenty-eight million dollars.

(d) For 2024, thirty-three million dollars.

2. For each individual project, the empire state development corporation shall approve a schedule for the maximum amount of credits to be issued in a calendar year.

§ 459. Penalties. 1. If a participant fails to maintain the job levels required in subdivision three of section four hundred fifty-two of this article, or in any other way fails to comply with the terms, the empire state development corporation may terminate or reduce the benefits, or may ask for a one hundred percent refund of assistance received.

2. If the participant fails to comply with terms during the post-term reporting period, the empire state development corporation may require a refund of up to seventy-five percent of assistance received.

§ 2. The tax law is amended by adding a new section 44 to read as follows:

§ 44. Capital investment jobs retention program credit. (a) Allowance of credit. A taxpayer subject to tax under article nine-A, twenty-two or thirty-three of this chapter shall be allowed a credit against such tax, pursuant to the provisions referenced in subdivision (e) of this section. The amount of the credit, allowable for ten consecutive tax years, is equal to the amount determined pursuant to section four hundred fifty-four of the economic development law.

(b) Eligibility. To be eligible for the capital investment jobs retention credit, the taxpayer shall have been issued a certificate of tax credit by the department of economic development pursuant to subdivision four of section four hundred fifty-three of the economic development law, which certificate shall set forth the amount of the credit that may be claimed for the taxable year. A taxpayer may claim such credit for up to ten consecutive taxable years commencing in the first taxable year that the taxpayer receives a certificate of tax credit or the first taxable year listed on its preliminary schedule of benefits, whichever is later.

However, a taxpayer shall not be allowed to claim the credit prior to the tax year commencing on or after January first, two thousand twenty-one and before January first, two thousand twenty-two. The taxpayer shall be allowed to claim only the amount listed on the certificate of

tax credit for that taxable year. Such certificate, if required by the commissioner, shall be attached to the taxpayer's return. No cost or expense paid or incurred by the taxpayer which is included as part of the calculation of this credit shall be the basis of any other tax credit.

(c) Information sharing. (1) Notwithstanding any provision of this chapter, employees and officers of the department of economic development and the department shall be allowed and are directed to share and exchange:

(A) information derived from tax returns or reports that is relevant to a taxpayer's eligibility to participate in the capital investment jobs retention program;

(B) information regarding the credit applied for, allowed or claimed pursuant to this section and taxpayers who are applying for the credit or who are claiming the credit; and

(C) information contained in or derived from credit claim forms submitted to the department and applications for admission into the capital investment jobs retention program.

Except as provided in paragraph two of this subdivision, all information exchanged between the department of economic development and the department shall not be subject to disclosure or inspection under the state's freedom of information law.

(2) Notwithstanding any provision of this chapter, the commissioner or the commissioner's designee is authorized to release the name of each taxpayer claiming the credit and the amount of the credit earned by each taxpayer. However, if the taxpayer claims a credit because the taxpayer is a member of a limited liability company, a partner in a partnership or a shareholder in a subchapter S corporation, only the name of a limited liability company, partnership or subchapter S corporation participating in the capital investment jobs retention program and the amount of credit earned by that entity may be released.

(d) Credit recapture. If a certificate of eligibility or a certificate of tax credit issued by the department of economic development under article twenty-three of the economic development law is revoked by such department, the amount of credit described in this section and claimed by the taxpayer prior to that revocation shall be added back to tax in the taxable year in which any such revocation becomes final.

(e) Cross-references. For application of the credit provided for in this section, see the following provisions of this chapter:

(1) article 9-A: section 210-B, subdivision 53;

(2) article 22: section 606, subsection (jjj);

(3) article 33, section 1511, subdivision (dd).

§ 3. Section 210-B of the tax law is amended by adding a new subdivision 53 to read as follows:

53. Capital investment jobs retention program credit. (a) Allowance of credit. A taxpayer will be allowed a credit, to be computed as provided in section forty-four of this chapter, against the taxes imposed by this article.

(b) Application of credit. The credit allowed under this subdivision for any taxable year will not reduce the tax due for such year to less than the minimum tax fixed by this article. However, if the amount of credit allowed under this subdivision for any taxable year reduces the tax to such amount, any amount of credit thus not deductible in such taxable year will be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter. Provided, however, the provisions of

subsection (c) of section one thousand eighty-eight of this chapter notwithstanding, no interest will be paid thereon.

§ 4. Section 606 of the tax law is amended by adding a new subsection (jjj) to read as follows:

(jjj) Capital investment jobs program retention credit. (1) Allowance of credit. A taxpayer shall be allowed a credit, to be computed as provided in section forty-four of this chapter, against the tax imposed by this article.

(2) Application of credit. If the amount of the credit allowed under this subsection for any taxable year exceeds the taxpayer's tax for such year, the excess will be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of section six hundred eighty-six of this article, provided, however, that no interest will be paid thereon.

§ 5. Subparagraph (B) of paragraph 1 of subsection (i) of section 606 of the tax law is amended by adding a new clause (xliv) to read as follows:

(xliv) Capital investment jobs retention program credit	Amount of credit under subdivision fifty-three of section two hundred ten-B

§ 6. Section 1511 of the tax law is amended by adding a new subdivision (dd) to read as follows:

(dd) Capital investment jobs retention program credit. (1) Allowance of credit. A taxpayer shall be allowed a credit, to be computed as provided in section forty-four of this chapter, against the taxes imposed by this article.

(2) Application of credit. The credit allowed under this subdivision for any taxable year will not reduce the tax due for such year to less than the minimum tax fixed by this article. However, if the amount of credit allowed under this subdivision for any taxable year reduces the tax to such amount, any amount of credit thus not deductible in such taxable year will be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter. Provided, however, the provisions of subsection (c) of section one thousand eighty-eight of this chapter notwithstanding, no interest will be paid thereon.

§ 7. This act shall take effect immediately; provided however that sections two, three, four, five and six of this act shall apply to taxable years beginning on and after January 1, 2021.