

LEGISLATURE OF NEBRASKA

ONE HUNDRED THIRD LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 34

Introduced by Hadley, 37.

Read first time January 10, 2013

Committee: Revenue

A BILL

1 FOR AN ACT relating to the Nebraska Advantage Act; to amend sections
2 77-5707.01, 77-5709, 77-5712, 77-5720, and 77-5728,
3 Reissue Revised Statutes of Nebraska, and sections
4 77-5719, 77-5723, 77-5726, 77-5731, and 77-5735, Revised
5 Statutes Cumulative Supplement, 2012; to redefine terms;
6 to change provisions relating to applications, credits,
7 and transfers of incentives; to harmonize provisions; and
8 to repeal the original sections.
9 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 77-5707.01, Reissue Revised Statutes
2 of Nebraska, is amended to read:

3 77-5707.01 County average weekly wage for any calendar
4 year means the most recent average weekly wage paid by all employers
5 in the county as reported by the Department of Labor by October 1 of
6 the year prior to application.

7 Sec. 2. Section 77-5709, Reissue Revised Statutes of
8 Nebraska, is amended to read:

9 77-5709 Equivalent employees means the number of
10 employees computed by dividing the total hours paid in a year by the
11 product of forty times the number of weeks in a year. A salaried
employee who receives a predetermined amount of compensation each pay
period on a weekly, or less frequent basis, is deemed to have been
paid for forty hours per week during the pay period.

15 Sec. 3. Section 77-5712, Reissue Revised Statutes of
16 Nebraska, is amended to read:

17 77-5712 Nebraska average weekly wage for any calendar
18 year means the most recent average weekly wage paid by all employers
19 in all counties in Nebraska as reported by the Department of Labor by
20 October 1 of the year prior to application.

21 Sec. 4. Section 77-5719, Revised Statutes Cumulative
22 Supplement, 2012, is amended to read:

23 77-5719 Taxpayer means any person subject to sales and
24 use taxes under the Nebraska Revenue Act of 1967 and subject to
25 withholding under section 77-2753 and any ~~corporation, partnership,~~

1 limited liability company, cooperative, including a cooperative
2 exempt under section 521 of the Internal Revenue Code of 1986, as
3 amended, limited cooperative association, or joint venture entity
4 that is or would otherwise be a member of the same unitary group, if
5 incorporated, that is subject to such sales and use taxes ~~or and~~ such
6 withholding. Taxpayer does not include a political subdivision or an
7 organization that is exempt from income taxes under section 501(a) of
8 the Internal Revenue Code of 1986, as amended. For purposes of this
9 section, political subdivision includes any public corporation
10 created for the benefit of a political subdivision and any group of
11 political subdivisions forming a joint public agency, organized by
12 interlocal agreement, or utilizing any other method of joint
13 action. , or any partnership, limited liability company, cooperative,
14 including a cooperative exempt under section 521 of the Internal
15 Revenue Code of 1986, as amended, limited cooperative association, or
16 joint venture in which political subdivisions or organizations
17 described in section 501(c) or (d) of the code hold an ownership
18 interest of twenty percent or more.

19 Sec. 5. Section 77-5720, Reissue Revised Statutes of
20 Nebraska, is amended to read:

21 77-5720 Year means the taxable year of the taxpayer.
22 calendar year.

23 Sec. 6. Section 77-5723, Revised Statutes Cumulative
24 Supplement, 2012, is amended to read:

25 77-5723 (1) In order to utilize the incentives set forth

1 in the Nebraska Advantage Act, the taxpayer shall file an
2 application, on a form developed by the Tax Commissioner, requesting
3 an agreement with the Tax Commissioner.

4 (2) The application shall contain:

5 (a) A written statement describing the plan of employment
6 and investment for a qualified business in this state;

7 (b) Sufficient documents, plans, and specifications as
8 required by the Tax Commissioner to support the plan and to define a
9 project;

10 (c) If more than one location within this state is
11 involved, sufficient documentation to show that the employment and
12 investment at different locations are interdependent parts of the
13 plan. A headquarters shall be presumed to be interdependent with each
14 other location directly controlled by such headquarters. If a
15 taxpayer's plan includes every location in the state that is involved
16 in a qualified business activity, then all of the taxpayer's
17 locations are presumed to be interdependent. A showing that the parts
18 of the plan would be considered parts of a unitary business for
19 corporate income tax purposes shall not be sufficient to show
20 interdependence for the purposes of this subdivision;

21 (d) A nonrefundable application fee of one thousand
22 dollars for a tier 1 project, two thousand five hundred dollars for a
23 tier 2, tier 3, or tier 5 project, five thousand dollars for a tier 4
24 project, and ten thousand dollars for a tier 6 project. The fee shall
25 be credited to the Nebraska Incentives Fund; and

The application and all supporting information shall be confidential except for the name of the taxpayer, the location of the project, the amounts of increased employment and investment, and the information required to be reported by sections 77-5731 and 77-5734.

1 project, the required level of investment shall be met prior to the
2 end of the fourth year after the expiration of the tier 2 large data
3 center project entitlement period relating to direct sales tax
4 refunds.

5 (5) After approval, the taxpayer and the Tax Commissioner
6 shall enter into a written agreement. The taxpayer shall agree to
7 complete the project, and the Tax Commissioner, on behalf of the
8 State of Nebraska, shall designate the approved plan of the taxpayer
9 as a project and, in consideration of the taxpayer's agreement, agree
10 to allow the taxpayer to use the incentives contained in the Nebraska
11 Advantage Act. The application, and all supporting documentation, to
12 the extent approved, shall be considered a part of the agreement. The
13 agreement shall state:

14 (a) The levels of employment and investment required by
15 the act for the project;

16 (b) The time period under the act in which the required
17 levels must be met;

18 (c) The documentation the taxpayer will need to supply
19 when claiming an incentive under the act;

20 (d) The date the application was filed; and

21 (e) A requirement that the company update the Department
22 of Revenue annually on any changes in plans or circumstances which
23 affect the timetable of sales tax refunds as set out in the
24 application. If the company fails to comply with this requirement,
25 the Tax Commissioner may defer any pending sales tax refunds until

1 the company does comply.

2 (6) The incentives contained in section 77-5725 shall be
3 in lieu of the tax credits allowed by the Nebraska Advantage Rural
4 Development Act for any project. In computing credits under the act,
5 any investment or employment which is eligible for benefits or used
6 in determining benefits under the Nebraska Advantage Act shall be
7 subtracted from the increases computed for determining the credits
8 under section 77-27,188. New investment or employment at a project
9 location that results in the meeting or maintenance of the employment
10 or investment requirements, the creation of credits, or refunds of
11 taxes under the Employment and Investment Growth Act shall not be
12 considered new investment or employment for purposes of the Nebraska
13 Advantage Act. The use of carryover credits under the Employment and
14 Investment Growth Act, the Invest Nebraska Act, the Nebraska
15 Advantage Rural Development Act, or the Quality Jobs Act shall not
16 preclude investment and employment from being considered new
17 investment or employment under the Nebraska Advantage Act. The use of
18 property tax exemptions at the project under the Employment and
19 Investment Growth Act shall not preclude investment not eligible for
20 the property tax exemption from being considered new investment under
21 the Nebraska Advantage Act.

22 (7) A taxpayer and the Tax Commissioner may enter into
23 agreements for more than one project and may include more than one
24 project in a single agreement. The projects may be either sequential
25 or concurrent. A project may involve the same location as another

1 project. No new employment or new investment shall be included in
2 more than one project for either the meeting of the employment or
3 investment requirements or the creation of credits. When projects
4 overlap and the plans do not clearly specify, then the taxpayer shall
5 specify in which project the employment or investment belongs.

6 (8) The taxpayer may request that an agreement be
7 modified if the modification is consistent with the purposes of the
8 act and does not require a change in the description of the project.
9 An agreement may not be modified to a tier that would grant a higher
10 level of benefits to the taxpayer or to a tier 1 project. Once
11 satisfied that the modification to the agreement is consistent with
12 the purposes stated in the act, the Tax Commissioner and taxpayer may
13 amend the agreement. For a tier 6 project, the taxpayer must agree to
14 limit the project to qualified activities allowable under tier 2 and
15 tier 4.

16 Sec. 7. Section 77-5726, Revised Statutes Cumulative
17 Supplement, 2012, is amended to read:

18 77-5726 (1)(a) The credits prescribed in section 77-5725
19 for a year shall be established by filing the forms required by the
20 Tax Commissioner with the income tax return for the year. taxable
21 year which includes the end of the year the credits were earned. The
22 credits may be used and shall be applied in the order in which they
23 were first allowed. The credits may be used after any other
24 nonrefundable credits to reduce the taxpayer's income tax liability
25 imposed by sections 77-2714 to 77-27,135. Credits may be used

beginning with the taxable year which includes December 31 of the year the required minimum levels were reached. The last year for which credits may be used is the taxable year which includes December 31 of the last year of the carryover period. Any decision on how part of the credit is applied shall not limit how the remaining credit could be applied under this section.

1 credit on an employee's income tax return as income tax withheld
2 under section 77-2755.

3 For a tier 1, tier 2, tier 3, or tier 4 project, the
4 amount of credits used against income tax withholding shall not
5 exceed the withholding attributable to new employees employed at the
6 project, excluding any compensation in excess of one million dollars
7 paid to any one employee during the year.

8 For a tier 6 project, the amount of credits used against
9 income tax withholding shall not exceed the withholding attributable
10 to all employees employed at the project, other than base-year
11 employees and excluding any compensation in excess of one million
12 dollars paid to any one employee during the year.

13 If the amount of credit used by the taxpayer against
14 income tax withholding exceeds this amount, the excess withholding
15 shall be returned to the Department of Revenue in the manner provided
16 in section 77-2756, such excess amount returned shall be considered
17 unused, and the amount of unused credits may be used as otherwise
18 permitted in this section or shall carry over to the extent
19 authorized in subdivision (1)(e) of this section.

20 (c) Credits may be used to obtain a refund of sales and
21 use taxes under the Local Option Revenue Act, the Nebraska Revenue
22 Act of 1967, and sections 13-319, 13-324, and 13-2813 which are not
23 otherwise refundable that are paid on purchases, including rentals,
24 for use at the project for a tier 1, tier 2, tier 3, or tier 4
25 project or for use within this state for a tier 2 large data center

1 project or a tier 6 project.

2 (d) The credits earned for a tier 6 project may be used
3 to obtain a payment from the state equal to the real property taxes
4 due after the year the required levels of employment and investment
5 were met and before the end of the carryover period, for real
6 property that is included in such project and acquired by the
7 taxpayer, whether by lease or purchase, after the date the
8 application was filed. Once the required levels of employment and
9 investment for a tier 2 large data center project have been met, the
10 credits earned for a tier 2 large data center project may be used to
11 obtain a payment from the state equal to the real property taxes due
12 after the year of application and before the end of the carryover
13 period, for real property that is included in such project and
14 acquired by the taxpayer, whether by lease or purchase, after the
15 date the application was filed. The payment from the state shall be
16 made only after payment of the real property taxes have been made to
17 the county as required by law. Payments shall not be allowed for any
18 taxes paid on real property for which the taxes are divided under
19 section 18-2147 or 58-507.

20 (e) Credits may be carried over until fully utilized,
21 except that such credits may not be carried over more than nine years
22 after the year of application for a tier 1 or tier 3 project,
23 fourteen years after the year of application for a tier 2 or tier 4
24 project, or more than one year past the end of the entitlement period
25 for a tier 6 project.

1 (2)(a) No refund claims shall be filed until after the
2 required levels of employment and investment have been met.

3 (b) Refund claims shall be filed no more than once each
4 quarter for refunds under the Nebraska Advantage Act, except that any
5 claim for a refund in excess of twenty-five thousand dollars may be
6 filed at any time.

7 (c) Refund claims for materials purchased by a purchasing
8 agent shall include:

9 (i) A copy of the purchasing agent appointment;
10 (ii) The contract price; and

11 (iii)(A) For refunds under subdivision (2)(a)(iii) or (2)
12 (a)(v) of section 77-5725, a certification by the contractor or
13 repairperson of the percentage of the materials incorporated into or
14 annexed to the project on which sales and use taxes were paid to
15 Nebraska after appointment as purchasing agent; or

16 (B) For refunds under subdivision (2)(a)(iv) of section
17 77-5725, a certification by the contractor or repairperson of the
18 percentage of the contract price that represents the cost of
19 materials annexed to the project and the percentage of the materials
20 annexed to the project on which sales and use taxes were paid to
21 Nebraska after appointment as purchasing agent.

22 (d) All refund claims shall be filed, processed, and
23 allowed as any other claim under section 77-2708, except that the
24 amounts allowed to be refunded under the Nebraska Advantage Act shall
25 be deemed to be overpayments and shall be refunded notwithstanding

1 any limitation in subdivision (2)(a) of section 77-2708. The refund
2 may be allowed if the claim is filed within three ~~calendar~~-years from
3 the end of the year the required levels of employment and investment
4 are met or within the period set forth in section 77-2708.

5 (e) If a claim for a refund of sales and use taxes under
6 the Local Option Revenue Act or sections 13-319, 13-324, and 13-2813
7 of more than twenty-five thousand dollars is filed by June 15 of a
8 given year, the refund shall be made on or after November 15 of the
9 same year. If such a claim is filed on or after June 16 of a given
10 year, the refund shall not be made until on or after November 15 of
11 the following year. The Tax Commissioner shall notify the affected
12 city, village, county, or municipal county of the amount of refund
13 claims of sales and use taxes under the Local Option Revenue Act or
14 sections 13-319, 13-324, and 13-2813 that are in excess of twenty-
15 five thousand dollars on or before July 1 of the year before the
16 claims will be paid under this section.

17 (f) Interest shall not be allowed on any taxes refunded
18 under the Nebraska Advantage Act.

19 (3) The appointment of purchasing agents shall be
20 recognized for the purpose of changing the status of a contractor or
21 repairperson as the ultimate consumer of tangible personal property
22 purchased after the date of the appointment which is physically
23 incorporated into or annexed to the project and becomes the property
24 of the owner of the improvement to real estate or the taxpayer. The
25 purchasing agent shall be jointly liable for the payment of the sales

1 and use tax on the purchases with the owner of the property.

2 (4) A determination that a taxpayer is not engaged in a
3 qualified business or has failed to meet or maintain the required
4 levels of employment or investment for incentives, exemptions, or
5 recapture may be protested within sixty days after the mailing of the
6 written notice of the proposed determination. If the notice of
7 proposed determination is not protested within the sixty-day period,
8 the proposed determination is a final determination. If the notice is
9 protested, the Tax Commissioner shall issue a written order resolving
10 such protests. The written order of the Tax Commissioner resolving a
11 protest may be appealed to the district court of Lancaster County
12 within thirty days after the issuance of the order.

13 Sec. 8. Section 77-5728, Reissue Revised Statutes of
14 Nebraska, is amended to read:

15 77-5728 (1) The incentives allowed under the Nebraska
16 Advantage Act shall not be transferable except in the following
17 situations:

18 (a) Any credit allowable to a partnership, a limited
19 liability company, a subchapter S corporation, a cooperative,
20 including a cooperative exempt under section 521 of the Internal
21 Revenue Code of 1986, as amended, a limited cooperative association,
22 or an estate or trust may be distributed to the partners, members,
23 shareholders, patrons, or beneficiaries in the same manner as income
24 is distributed for use against their income tax liabilities, and such
25 partners, members, shareholders, or beneficiaries shall be deemed to

1 have made an underpayment of their income taxes for any recapture
2 required by section 77-5727. A credit distributed shall be considered
3 a credit used and the partnership, limited liability company,
4 subchapter S corporation, cooperative, including a cooperative exempt
5 under section 521 of the Internal Revenue Code of 1986, as amended, a
6 limited cooperative association, estate, or trust shall be liable for
7 any repayment required by section 77-5727; and

8 (b) The incentives previously allowed and the future
9 allowance of incentives may be transferred when a project covered by
10 an agreement is transferred in its entirety by sale or lease to
11 another taxpayer or in an acquisition of assets qualifying under
12 section 381 of the Internal Revenue Code of 1986, as amended.

13 (2) The acquiring taxpayer, as of the date of
14 notification of the Tax Commissioner of the completed transfer, shall
15 be entitled to any unused credits and to any future incentives
16 allowable under the act.

17 (3) The acquiring taxpayer shall be liable for any
18 recapture that becomes due after the date of the transfer for the
19 repayment of any benefits received either before or after the
20 transfer.

21 (4) If a taxpayer operating a project and allowed a
22 credit under the act dies and there is a credit remaining after the
23 filing of the final return for the taxpayer, the personal
24 representative shall determine the distribution of the credit or any
25 remaining carryover with the initial fiduciary return filed for the

1 estate. The determination of the distribution of the credit may be
2 changed only after obtaining the permission of the Tax Commissioner.

3 (5) The Department of Revenue may disclose information to
4 the acquiring taxpayer about the project and prior benefits that is
5 reasonably necessary to determine the future incentives and
6 liabilities of the project.

7 Sec. 9. Section 77-5731, Revised Statutes Cumulative
8 Supplement, 2012, is amended to read:

9 77-5731 (1) The Tax Commissioner shall submit
10 electronically an annual report to the Legislature no later than July
11 15 of each year.

12 (2) The report shall list (a) the agreements which have
13 been signed during the previous ~~calendar~~ year, (b) the agreements
14 which are still in effect, (c) the identity of each taxpayer who is
15 party to an agreement, and (d) the location of each project.

16 (3) The report shall also state, for taxpayers who are
17 parties to agreements, by industry group (a) the specific incentive
18 options applied for under the Nebraska Advantage Act, (b) the refunds
19 allowed on the investment, (c) the credits earned, (d) the credits
20 used to reduce the corporate income tax and the credits used to
21 reduce the individual income tax, (e) the credits used to obtain
22 sales and use tax refunds, (f) the credits used against withholding
23 liability, (g) the number of jobs created under the act, (h) the
24 total number of employees employed in the state on the last day of
25 the calendar quarter prior to the application date and the total

1 number of employees employed in the state on subsequent reporting
2 dates, (i) the expansion of capital investment, (j)-(i) the estimated
3 wage levels of jobs created under the act subsequent to the
4 application date, (k)-(j) the total number of qualified applicants,
5 (l)-(k) the projected future state revenue gains and losses, (m)-(l)
6 the sales tax refunds owed, (n)-(m) the credits outstanding under the
7 act, (o)-(n) the value of personal property exempted by class in each
8 county under the act, (p)-(o) the value of property for which
9 payments equal to property taxes paid were allowed in each county,
10 and (q)-(p) the total amount of the payments.

11 (4) In estimating the projected future state revenue
12 gains and losses, the report shall detail the methodology utilized,
13 state the economic multipliers and industry multipliers used to
14 determine the amount of economic growth and positive tax revenue,
15 describe the analysis used to determine the percentage of new jobs
16 attributable to the Nebraska Advantage Act assumption, and identify
17 limitations that are inherent in the analysis method.

18 (5) The report shall provide an explanation of the audit
19 and review processes of the Department of Revenue in approving and
20 rejecting applications or the grant of incentives and in enforcing
21 incentive recapture. The report shall also specify the median period
22 of time between the date of application and the date the agreement is
23 executed for all agreements executed by December 31 of the prior
24 year.

25 (6) The report shall provide information on project-

1 specific total incentives used every two years for each approved
2 project. The report shall disclose (a) the identity of the taxpayer,
3 (b) the location of the project, and (c) the total credits used and
4 refunds approved during the immediately preceding two years expressed
5 as a single, aggregated total. The incentive information required to
6 be reported under this subsection shall not be reported for the first
7 year the taxpayer attains the required employment and investment
8 thresholds. The information on first-year incentives used shall be
9 combined with and reported as part of the second year. Thereafter,
10 the information on incentives used for succeeding years shall be
11 reported for each project every two years containing information on
12 two years of credits used and refunds approved. The incentives used
13 shall include incentives which have been approved by the department,
14 but not necessarily received, during the previous two calendar years.

15 (7) The report shall include an executive summary which
16 shows aggregate information for all projects for which the
17 information on incentives used in subsection (6) of this section is
18 reported as follows: (a) The total incentives used by all taxpayers
19 for projects detailed in subsection (6) of this section during the
20 previous two years; (b) the number of projects; (c) ~~the total number~~
~~of employees of these taxpayers employed in the state on the last day~~
~~of the calendar quarter prior to the application date,~~ the new jobs
23 at the project for which credits have been granted; ~~, and the total~~
24 ~~number of employees employed in the state by these taxpayers on~~
25 ~~subsequent reporting dates;~~ (d) the average compensation paid

1 employees in the state in the year of application and for the new
2 jobs at the project; and (e) the total investment for which
3 incentives were granted. The executive summary shall summarize the
4 number of states which grant investment tax credits, job tax credits,
5 sales and use tax refunds for qualified investment, and personal
6 property tax exemptions and the investment and employment
7 requirements under which they may be granted.

8 (8) No information shall be provided in the report that
9 is protected by state or federal confidentiality laws.

10 Sec. 10. Section 77-5735, Revised Statutes Cumulative
11 Supplement, 2012, is amended to read:

12 77-5735 (1) The changes made in sections 77-5703,
13 77-5708, 77-5712, 77-5714, 77-5715, 77-5723, 77-5725, 77-5726,
14 77-5727, and 77-5731 by Laws 2008, LB895, and sections 77-5707.01,
15 77-5719.01, and 77-5719.02 apply to all applications filed on and
16 after April 18, 2008. For all applications filed prior to such date,
17 the provisions of the Nebraska Advantage Act as they existed
18 immediately prior to such date apply.

19 (2) The changes made in sections 77-5725 and 77-5726 by
20 Laws 2010, LB879, apply to all applications filed on or after July
21 15, 2010. For all applications filed prior to such date, the taxpayer
22 may make a one-time election, within the time period prescribed by
23 the Tax Commissioner, to have the changes made in sections 77-5725
24 and 77-5726 by Laws 2010, LB879, apply to such taxpayer's
25 application, or in the absence of such an election, the provisions of

1 the Nebraska Advantage Act as they existed immediately prior to July
2 15, 2010, apply to such application.

3 (3) The changes made in sections 77-5707, 77-5715,
4 77-5719, and 77-5725 by Laws 2010, LB918, apply to all applications
5 filed on or after July 15, 2010. For all applications filed prior to
6 such date, the provisions of the Nebraska Advantage Act as they
7 existed immediately prior to such date apply.

8 (4) The changes made in sections 77-5701, 77-5703,
9 77-5705, 77-5715, 77-5723, 77-5725, 77-5726, and 77-5727 by Laws
10 2012, LB1118, apply to all applications filed on or after March 8,
11 2012. For all applications filed prior to such date, the provisions
12 of the Nebraska Advantage Act as they existed immediately prior to
13 such date apply.

14 (5) The changes made in sections 77-5707.01, 77-5709,
15 77-5712, 77-5719, 77-5720, 77-5723, 77-5726, and 77-5731 by this
16 legislative bill apply to all applications filed on or after the
17 effective date of this act. For all applications filed prior to such
18 date, the provisions of the Nebraska Advantage Act as they existed
19 immediately prior to such date apply.

20 Sec. 11. Original sections 77-5707.01, 77-5709, 77-5712,
21 77-5720, and 77-5728, Reissue Revised Statutes of Nebraska, and
22 sections 77-5719, 77-5723, 77-5726, 77-5731, and 77-5735, Revised
23 Statutes Cumulative Supplement, 2012, are repealed.