Significant Changes to the Job Creation Tax Credit and Job Retention Tax Credit Contained in Am. Sub. H.B. 1

The Bill includes several significant changes to the job creation tax credit and job retention tax credit.

On July 17, 2009, Governor Strickland signed Am. Sub. H.B. 1 (the "Bill"), the biennial operating budget bill for State fiscal years 2010 and 2011. The Bill includes several significant changes to the job creation tax credit and job retention tax credit, which are discussed in detail in this Client Alert. The Bill also includes changes to several other existing State tax credits, provides for two new State tax credits, provides for a new loan guarantee program and provides for a new sales tax "TIF" for major sporting events, all of which are discussed in detail in a companion Alert.

Changes to the Job Creation Tax Credit ("JCTC"):

- Under prior law, the JCTC was computed using the total State income taxes withheld from new full-time employees hired in connection with a project. The Bill eliminates the use of new full-time employee withholdings as the basis for determining the amount of the JCTC, and instead uses incremental increases in total withholdings for all employees employed in connection with a project. This incremental amount is compared to a base year total, which is adjusted annually for assumed payroll increases, to calculate the annual JCTC.

- Prior law required taxpayers to maintain operations for twice the term of the JCTC, and a failure to do so could result in the imposition of a clawback. The Bill adjusts the "maintain operations" requirement to require taxpayers to maintain operations at the project site for the greater of (1) seven years, or (2) the term of the JCTC plus three years.

- Prior law allowed the Tax Credit Authority to impose a discretionary clawback of the JCTC if a taxpayer failed to maintain operations at the project location for twice the term of the JCTC. The maximum amount of the discretionary clawback depended on the period during which the taxpayer maintained operations (25% if the taxpayer maintained operations for at least one and one half times the term of the JCTC; 50% if the taxpayer maintained operations for at least the term of the JCTC; 100% if the taxpayer maintained operations for less than the term of the JCTC). The Bill changes this graduated clawback. Under the Bill, if a taxpayer maintains operations at the project location for a period less than or equal to the term of the JCTC, the Tax Credit Authority may impose up to a 100% clawback. If the taxpayer maintains operations for longer than the term of the JCTC, but less than the greater of seven years or the term of the JCTC plus three years, the Tax Credit Authority may impose a clawback of up to 75%.

- Prior law required all tax credit agreements to include a provision that prohibited intrastate relocations unless such a relocation was approved by the Director of Development. The penalty for violating this requirement was <u>termination</u> of the JCTC. Under the Bill, tax credit agreements must prohibit JCTC recipients from relocating a "substantial" number of employment positions unless the Director of Development determines that the local jurisdiction from which positions are being relocated has been notified of the relocation. In addition, the mandatory termination provision associated with an unapproved relocation is eliminated under the Bill.

- *Note*: We understand that the Ohio Department of Development intends to apply these changes on a prospective basis only (e.g., existing Tax Credit Agreements will not be amended to incorporate these changes).

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Changes to the Job Retention Tax Credit ("JRTC"):

- Like the JCTC, under prior law, the JRTC was calculated based on the State income taxes withheld from full-time employment positions. The Bill changes the JRTC base to include the withholdings for all employees employed in a project, except for employees whose withholdings have been used as a basis for the JCTC.

- Prior law required JRTC recipients to invest at least $200 million in a project, or $100 million if the average wage for full-time employees was greater than 400% of the federal minimum wage. The Bill lowers the investment thresholds to (1) $50 million for businesses engaged at the site primarily as manufacturers, and (2) $20 million for businesses engaged at the site primarily in significant corporate administrative functions.

- Under prior law, eligible businesses were required to employ at least 1,000 full-time employees during the 12 months preceding the date of the JRTC application. The Bill reduces this threshold to not less than 500 "full-time equivalent" employees as of the date that the Tax Credit Authority approves the JRTC.

- The Bill makes similar changes to the anti-relocation provisions associated with the JRTC to the ones described above for the JCTC.

- Prior law included clawback provisions for the JRTC similar to the ones in place under the Bill for the JCTC, except only a 50% clawback could be imposed if a taxpayer maintained operations for longer than the term of the JRTC, but less than the greater of seven years or the term of the JRTC plus three years. Under the Bill, this clawback amount is changed to 75% consistent with the requirements in place for the JCTC.

- The Bill sets limits on the aggregate amount of JRTCs that may be granted by the Tax Credit Authority, but these limits apply only to projects approved by the Tax Credit Authority on or after July 1, 2009. For calendar year 2010, the limit is $13 million. In calendar years 2011 through 2023, the limit increases by $13 million each year. For calendar years 2024 and thereafter, the limit is $195 million.

- The Bill eliminates a requirement that the local political subdivision where the project is located provide substantial financial support to the project.

- The Bill makes foreign and domestic insurance companies eligible for the JRTC.

- *Note*: Like the JCTC, we understand that the Ohio Department of Development intends to apply these changes on a prospective basis only (e.g., existing Tax Credit Agreements will not be amended to incorporate these changes).