

*Supersedes Revenue Ruling 29-13-2, issued July 24, 2013
(which superseded Revenue Ruling 29-11-1, issued October 24, 2011)*

August 16, 2013

Electronic Verification of Employees' Eligibility Status

Issues and Conclusions

1. A taxpayer has either an approved incentive act application filed on or after October 1, 2009, or an increase in research expenditures during a tax year beginning on or after January 1, 2009, but did not electronically verify (using E-Verify) the work eligibility status of new employees at the time the employees were hired.

Can the taxpayer **electronically verify the employees at a later date**, and count those employees for purposes of qualifying for tax incentives under the incentive acts?

No. Once a taxpayer has filed an incentive act application, it may not subsequently use E-Verify for employees hired in earlier months or years and count those employees toward qualifying for tax incentives under any of these incentive act programs.

All incentive act applicants must confirm that they are registered for E-Verify to establish a date of application. If the taxpayer does not begin using E-Verify as of the date of application, only the new employees hired after the taxpayer begins to use E-Verify qualify as new employees for purposes of qualifying for the incentive acts. Temporary short-term lapses, such as the personnel director being on vacation, will not prevent the employees hired during that time from being counted as new employees.

Once the taxpayer begins using E-Verify, the taxpayer may qualify for tax incentives for new employees whose work eligibility is electronically verified from that point forward, even if there are temporary short-term lapses in verification.

For the Nebraska Advantage Research and Development Act, if electronic verification was not performed for all newly hired employees hired during the tax year in which the qualifying research expenditures in Nebraska were made, the tax credit will not be allowed for that year.

2. A taxpayer has either an approved incentive act application filed on or after October 1, 2009, or an increase in research expenditures during a tax year beginning on or after January 1, 2009.

Subsequent to the application date, the taxpayer **transferred out-of-state employees** to the project location. These employees were hired after October 1, 2009, but were not electronically verified at the time they were hired.

Can the taxpayer count the transferred employees for purposes of qualifying for tax incentives under the incentive acts?

Yes. If the **transferred employees were hired in another state**, have been continuously employed by the taxpayer, and were merely transferred into the Nebraska project location, they are not subject to the E-Verify requirement at the time they were hired. These employees are eligible to be counted as new employees for purposes of the incentive acts.

3. A taxpayer has either an approved incentive act application filed on or after October 1, 2009, or an increase in research expenditures during a tax year beginning on or after January 1, 2009.

Subsequent to the application date, the taxpayer **transferred in-state employees** to the project location. These employees were hired after October 1, 2009, and after the date of application, but were not electronically verified at the time they were hired.

Can the taxpayer count these transferred employees for purposes of qualifying for tax incentives under the incentive acts?

No. If the transferred employees were **newly hired employees working in Nebraska**, and were not electronically verified at the time they were hired, they are not eligible to be counted as new employees for purposes of the incentive acts.

Definitions

Base Year. Except for a Tier 5 Large Data Center (Tier 5LDC) project that is sequential to a Tier 2 Large Data Center (Tier 2LDC) project, base year means the year immediately preceding the year of application. For a Tier 5LDC project that is sequential to a Tier 2LDC project, the base year means the last year of the Tier 2LDC project entitlement period relating to direct sales tax refunds.

E-Verify. [E-Verify](#) is a free, Internet-based system, administered by the federal government, that electronically verifies the employment eligibility of newly hired employees. E-Verify allows participating employers to electronically compare employee information taken from the [Employment Eligibility Verification, Form I-9](#), against databases maintained by the Social Security Administration and the Department of Homeland Security.

Incentive Acts. The incentive acts addressed by this revenue ruling are the Nebraska Advantage Act, the Nebraska Advantage Rural Development Act, the Nebraska Advantage Research and Development Act, and the Nebraska Advantage Microenterprise Tax Credit Act.

Taxpayer. Taxpayer means any business or individual business owner that can qualify for tax incentives under one of the incentive acts.

Analysis

The Nebraska Advantage Act, the Nebraska Advantage Rural Development Act, and the Nebraska Advantage Microenterprise Tax Credit Act. In the Nebraska Advantage Act, [Neb. Rev. Stat. § 77-5722.01](#) states:

77-5722.01. Employees; verification of status required; exclusion.

- (1) The Tax Commissioner shall not approve or grant to any person any tax incentive under the Nebraska Advantage Act unless the taxpayer provides evidence

satisfactory to the Tax Commissioner that the taxpayer electronically verified the work eligibility status of all newly hired employees employed in Nebraska.

(2) For purposes of calculating any tax incentive under the act, the Tax Commissioner shall exclude hours worked and compensation paid to an employee that is not eligible to work in Nebraska as verified under subsection (1) of this section.

(3) This section does not apply to any application filed under the Nebraska Advantage Act prior to October 1, 2009.

E-Verify is currently the only electronic verification system for work eligibility status that meets the requirements of the various incentive acts. The Social Security Administration's website may be used to verify a Social Security number, but it is not a verification of work eligibility status.

When a taxpayer applies for tax incentives under these incentive acts, the taxpayer must provide information showing it has registered to use E-Verify. If the application is approved, the taxpayer must sign an agreement with the state promising to increase employment, investment, or both, by certain levels. All incentive act agreements that relate to applications filed on or after October 1, 2009, require a taxpayer to use E-Verify when new employees are hired.

The term "newly hired employees" is not defined in any of the incentive acts. The use of this term in [§ 77-5722.01](#) implies that the electronic verification must be conducted shortly after the new employee is hired. Employers who wish to use E-Verify must sign a [Memorandum of Understanding](#) (MOU) with the federal government which includes a provision stating that the "employer agrees to initiate E-Verify verification procedures for new employees within 3 employer business days after each employee has been hired" The MOU also states that employers may not use E-Verify procedures for "any other use not authorized."

The Nebraska Department of Revenue (Department) has determined that taxpayers cannot begin using E-Verify after filing the application (for example, the following month or year, or during the qualification audit) and either count those employees toward achieving the applicable employment levels or receive any tax incentives for these employees. Allowing after-the-fact electronic verifications would violate the language and intent of the incentive acts, the requirements of the agreements with the Department, and the express requirements of the taxpayer's MOU with the federal government authorizing use of E-Verify.

The obligation to register for and use E-Verify begins at the time the incentive act application is filed. New employees that were hired **before** the application date do not have to be checked with E-Verify to count toward achieving the applicable employment levels even if they are hired after the end of the base year.

Once the taxpayer begins using E-Verify to "verify the work eligibility status of all newly hired employees employed in Nebraska," the new employees whose work eligibility status was electronically verified will count toward determining eligibility of the taxpayer for the incentive acts. This is true even if there are temporary short-term lapses in the use of E-Verify. For example, if the personnel director is on vacation and a few new employees are hired and not verified until

shortly after the otherwise required three-day period, those employees can be counted as new employees, and any wages earned after they have been verified for work eligibility using E-Verify will qualify for tax incentives.

When employees are hired in, and their duty location is located in, another state, they are not employed in Nebraska. If, subsequent to the application date for the incentive acts, these employees are transferred to the project location, after having been continuously employed by the taxpayer, they are not newly hired employees. Because the transferred employees are not newly hired employees, the statutory requirement that “newly hired employees employed in Nebraska” be electronically verified does not apply. The date of hire does not make a difference as long as the above conditions are met.

When employees are hired in, and their duty location is located in, Nebraska on or after October 1, 2009, they are “newly hired employees employed in Nebraska” and the statutory requirement that they be electronically verified applies. The statute requires that **all** “newly hired employees employed in **Nebraska** [*emphasis added*]” be electronically verified, not just those employees initially placed at the project location. If, after the application date, employees are hired and the Nebraska employees are transferred to the project location, they do not count for purposes of qualifying for tax incentives under the incentive acts unless they have been properly electronically verified.

If a taxpayer acquires an existing Nebraska business, with existing employees in Nebraska, there is no requirement to electronically verify those existing employees. If the taxpayer hires new employees after the acquisition of the business, the new employees must be electronically verified in order to count for purposes of qualifying for tax incentives under the incentive acts.

Example:

ABC Company (ABC) applies for a Nebraska Advantage Act project on May 24, 2010. ABC’s base year is the year ending December 31, 2009. ABC hires two Nebraska employees, Employee A on April 1, 2010 and Employee B on October 31, 2010.

1. To count as a new employee, must Employee A be electronically verified?

No, because Employee A was hired **before** the date of application, there is no requirement for Employee A to be electronically verified, regardless of whether Employee A is hired at the project location or another location in Nebraska and later transferred to the project location.

2. To count as a new employee, must Employee B be electronically verified?

Yes, because Employee B was hired **after** the date of application, ABC is required to electronically verify Employee B. This is true even if Employee B was not originally hired to work at the project but is later transferred to the project location from another Nebraska location.

The Nebraska Advantage Research and Development Act. Because there is no employment threshold to be reached to qualify for benefits under this incentive act, the statutory language is slightly different than that found in the other incentive acts, as follows:

77-5808. Employees; verification of status required.

The Tax Commissioner shall not approve or grant to any person any tax incentive under the Nebraska Advantage Research and Development Act unless the taxpayer provides evidence satisfactory to the Tax Commissioner that the taxpayer electronically verified the work eligibility status of all newly hired employees employed in Nebraska. This section does not apply to any credit claimed in a tax year beginning or deemed to begin before January 1, 2009, under the Internal Revenue Code of 1986, as amended.

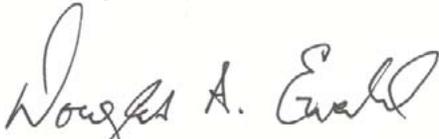
Taxpayers qualifying for benefits under this incentive act do not sign agreements in advance of receiving the tax credits. Taxpayers who have earned a federal research tax credit for activity that is in Nebraska may qualify for the credit and claim it on the Nebraska income tax return filed for that year. Nevertheless, because this statutory section also uses the term “newly hired employees,” and because the E-Verify system requires verification within three business days of hire, the analysis set forth above is essentially the same under this program.

If the electronic verification was not performed for all newly hired employees hired during the tax year in which the qualifying research expenditures in Nebraska were made, the tax credit will not be allowed for that year. The taxpayer may earn the tax credit for the following tax year if it made qualifying research expenditures in Nebraska and electronically verified all newly hired employees hired during that following tax year. Denial of the credit for the first year would change the start of the 21-year period that the credit is allowable, but would not necessarily shorten the overall time period during which the credit may be earned.

The analysis above for transferred employees, both from outside and within the state, also applies for purposes of the Nebraska Advantage Research and Development Act. The statutory requirement to use E-Verify for newly hired employees does not apply to out-of-state employees who were subsequently transferred to the project.

If the taxpayer first qualified for tax credits under the Nebraska Advantage Research and Development Act for a tax year beginning before January 1, 2009, new employees hired for that year did not have to be electronically verified to allow the taxpayer to be eligible for credits. However, new employees hired by that taxpayer during tax years beginning on or after January 1, 2009 must be electronically verified to allow the taxpayer to continue to qualify for tax credits. If the newly hired employees were not electronically verified, the taxpayer cannot qualify for tax credits for any tax year during which the newly hired employees were not electronically verified. Without proper use of E-Verify, this taxpayer may lose one or more of the 21 years the taxpayer is eligible to receive tax credits.

APPROVED:



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Tax Commissioner

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