

Part 280 RESTAURANT RETURN-TO-WORK TAX CREDIT PROGRAM

§ 280.1 Purpose and general description

The purpose of these regulations is to set forth the administrative process governing the Restaurant Return-to-Work Tax Credit Program (the “Program”) and specifically to establish an application process, standards for application evaluation and procedures for restaurants claiming the tax credit under this Program. Chapter 59 of the Laws of 2021 establishes the Program and grants the Commissioner of the Department of Economic Development the authority to promulgate regulations to establish procedures for the allocation of the Restaurant Return-to-Work Tax Credit.

§ 280.2 Definitions

For the purposes of this article:

a. “Applicant” means a business entity that is operating in New York State and has applied for benefits under this Program.

b. “Average ending full-time employment” shall be calculated as the average number of full-time equivalent positions employed by a business entity in an eligible industry between April 1, 2021, and August 31, 2021 or April 1, 2021 and December 31, 2021, whichever of these two periods the business entity selects.

c. “Average full-time employment” shall mean the average number of full-time equivalent positions employed by a business entity in an eligible industry during a given period.

d. “Average starting full-time employment” shall be calculated as the average number of full-time equivalent positions employed by a business entity in an eligible industry between January 1, 2021, and March 31, 2021.

e. “Business entity” shall mean a sole proprietor, partnership, limited liability company, or a corporation (C-Corp or S-Corp) with its own federal employer identification number (FEIN), or in the case of a sole proprietor, a social security number.

f. "Certificate of tax credit" means the document issued to a business entity by the Department after the Department has verified that the business entity has met all applicable eligibility criteria in Part 280 herein. The certificate shall specify the exact amount of the tax credit that a business entity may claim under this program.

g. "Certificate of additional tax credit" means the document issued to a business entity by the department after the department has verified that the business entity has met all applicable eligibility criteria in section 280.4 herein. The certificate shall specify the exact amount of the tax credit that a business entity may claim pursuant to section 280.5 of this program.

[g] h. "Commissioner" shall mean the commissioner or acting commissioner of the Department of Economic Development.

[h] i. "COVID-19 impacted food services sector" means:

(1) independently owned establishments that are located inside New York City and have therefore been subjected to additional restrictions on on-premises dining pursuant to guidance from the New York State Department of Health, under Executive Order 202, as amended, and are primarily organized to prepare and provide meals, and/or beverages to customers for consumption, including for immediate indoor on-premises consumption; and

(2) independently owned establishments that are located outside of New York City in an area which was designated by the New York State Department of Health as either an orange zone or red zone pursuant to Executive Order 202.68 as amended, and for which such designation was in effect and resulted in additional restrictions on on-premises dining for at least thirty (30) consecutive days, and are primarily organized to prepare and provide meals, and/or beverages to customers for consumption, including for immediate indoor on-premises consumption.

[i] j. "Department" shall mean the Department of Economic Development.

[j] k. "Eligible industry" means a business entity operating predominantly in the COVID-19 impacted food services sector as defined in subdivision ([h] i) of this section.

[k] l. “Independently Owned” means a business entity that is not: 1) a publicly traded entity or no more than five percent of the beneficial ownership of which is owned, directly or indirectly by a publicly traded entity; 2) a subsidiary; and 3) operated under a franchise or similar agreement which independently manages and controls the day-to-day operations of its own business through its ownership and management, without substantial influence by an outside entity that may have an ownership and/or financial interest in the management responsibilities of the small business.

[l] m. “Independently owned establishments” means, for the purposes of this part, full-service and limited service food and/or beverage establishments in the food services sector that are primarily organized to prepare and provide meals and/or beverages to customers for consumption and operate predominantly as and make significant accommodations for in-person dining, such as:

1. Bars, taverns, nightclubs, or drinking places primarily engaged in preparing and serving alcoholic beverages for immediate on-premises consumption;
2. Full-service restaurants primarily engaged in providing food services to patrons who order and are served while seated (i.e. waiter/waitress service) and paying after eating;
3. Limited-service restaurants engaged in providing food services (except snack and nonalcoholic beverage bars) where patrons generally order or select items and pay before eating; and
4. Breweries/wineries/cideries/distilleries/meaderies with a tasting room and for which on-premise sales represent at least thirty-three percent of gross receipts.

[m] n. “Net employee increase” means an increase of at least one full-time equivalent employee between the average starting full-time employment and the average ending full-time employment of a business entity; provided, however, that for purposes of calculating the tax credits in section 280.5 of this Part, net employee increase means an increase of at least one full-time equivalent employee between the average starting full-time employment and the average ending full-time employment at an independently owned and operated establishment or establishments in a COVID-19 impacted food services sector. Provided further that if an eligible business entity has two or more locations, the net employee increase for purposes of calculating the tax credit shall be the lesser of the net employee

increase for the business entity overall and the net employee increase at an independently owned and operated establishment or establishments in a COVID-19 impacted food services sector.

[n] o. “Participant” means an applicant that has submitted a complete application and been approved by the Department to participate in the Program.

§ 280.3 Application and approval process

a. An applicant must submit a complete application as prescribed by the commissioner for the restaurant return-to-work credit and the additional restaurant return-to-work credit. An applicant must submit a complete application for the restaurant return-to-work credit as described in section 280.5(a) of this Part by May 1, 2022. In addition, a complete application for the additional restaurant return-to-work credit as outlined in section 280.5(d) of this Part must be submitted by July 1, 2022.

An application shall not be approved by the Department unless the Department determines, in its discretion, that the following criteria are met:

- 1) the application is complete;
- 2) the applicant provided evidence of their business eligibility in a form and manner prescribed by the commissioner;
- (3) the applicant agreed to allow the Department of Taxation and Finance to share the applicant’s tax information with the Department. However, any information shared as a result of this Program shall not be available for disclosure or inspection under the state freedom of information law;
- (4) the applicant agreed 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 Program shall not be available for disclosure or inspection under the state freedom of information law;
- (5) the applicant agreed to allow the Department and its agents access to any and all books and records the Department may require to monitor compliance;

(6) the applicant certified, under penalty of perjury, that it is in substantial compliance with all emergency orders or public health regulations currently required of such entity and local, and state tax laws; and

(7) the applicant agreed to provide any additional information required by the Department relevant to this program.

b. After reviewing an applicant's completed application and determining that the applicant meets the eligibility criteria as set forth in section 280.4 of this Part, the Department may admit the applicant into the Program and issue them a certificate of tax credit. An applicant that does not meet the eligibility criteria set forth in section 280.4 of this Part shall not be accepted into the Program.

c. Allocation of credits. For applicants that are accepted into the Program, credits will be allocated based upon the date an application is submitted provided it is also deemed complete by the Department. Applicants will be notified if an application is incomplete and will be provided five business days to submit additional information or documentation. If an applicant provides the requested additional information or documentation within five business days such that the application is complete, the date the applicant originally submitted its application shall be used for allocating credits. If an applicant does not provide a complete application within five business days of being notified, the date that the remainder of the requested information or documentation is submitted, such that the application is complete, will be used for allocating credits. The Department will notify the person identified in the application as the contact and such notification will be via email.

§ 280.4 Eligibility criteria for the restaurant return-to-work credit and additional restaurant return-to-work credit

a. To be eligible for a tax credit [under the restaurant return-to-work tax credit Program] for the restaurant return-to-work credit or additional restaurant return-to-work credit, an applicant must:

1. be a small business as defined in section one hundred thirty-one of the economic development law and have fewer than one hundred full-time job equivalents in New York state as of April 1, 2021;

2. operate an independently owned establishment or establishments as defined in section 280.2([1] m) of this Part;

3. have experienced economic harm as a result of the COVID-19 emergency as evidenced by a year-to-year decrease of at least forty percent in New York State between the second quarter of 2019 and the second quarter of 2020 or the third quarter of 2019 and the third quarter of 2020 for one or both of: i) gross receipts or ii) average full-time employment; and

4. have demonstrated a net employee increase as defined in this Part for the business entity and for purposes of calculating the tax credit.

b. A business entity must be in substantial compliance with all emergency orders or public health regulations currently required of such entity and local, and state tax laws. In addition, a business entity may not owe past due state taxes or local property taxes unless the business entity is making payments and complying with an approved binding payment agreement entered into with the taxing authority.

§ 280.5 Calculation of the Restaurant return-to-work tax credit and additional restaurant return to work credit.

a. An applicant [in] for the Restaurant Return-to-Work Tax Credit [Program] that meets the eligibility requirements of section 280.4 may be eligible to claim a credit equal to five thousand dollars (\$5,000) per each full-time equivalent net employee increase as defined in section 280.2([m] n) of this Part.

b. An applicant may not receive in excess of fifty thousand dollars (\$50,000) in tax credits under [this Program] subdivision (a) of this section.

c. The Restaurant Return-to-Work Tax Credit shall be refundable as provided in the Tax Law.

d. An applicant in the restaurant return-to-work tax credit program that applies for the additional restaurant return-to-work credit may be eligible to claim a credit equal to five thousand dollars per each full-time equivalent net employee increase above ten, not to exceed twenty, as defined in section 280.2(n) of this Part. The amount of the business entity's additional restaurant return-to-work tax credit shall

be calculated by using the date the business entity chose to calculate its average ending full-time employment as described in section 280.2(b) of this Part.

Provided, however, that in calculating the full-time equivalent net employee increase above ten, the jobs must continue to exist as of March thirty-first, two thousand twenty-two. A business entity in the restaurant return-to-work program that ceased operations on or before March thirty-first, two thousand twenty-two, is not eligible for the credit provided by this section.

e. An applicant may not receive in excess of fifty thousand dollars in tax credits under subdivision (d) of this section.

§ 280.6 Retention and Reporting requirements

a. Each participant in the Program shall keep all relevant records for their duration of Program participation for at least three years.

b. Each participant in this Program must submit a performance report to the Department by February 4, 202[2] 3. For the purposes of this requirement, the completed application, including all requested supporting documentation, submitted by a participant shall be considered a performance report.

c. The commissioner shall on or before April 1, 2022 and every quarter thereafter until Program funds are fully expended, submit a report to the governor, the temporary president of the senate, the speaker of the assembly, the chair of the senate finance committee and the chair of the assembly ways and means committee setting forth the activities undertaken by the Program. Such report shall include, but need not be limited to, the following in each reporting period: total number of participants approved and the economic development region in which the business is located, total amount of advance payments disbursed and tax credits claimed, and average amount of advance payment disbursed and tax credit claimed; names of advance payment recipients and tax credit claimed; total number of rehired jobs created; and such other information as the commissioner determines necessary and appropriate to effectuate the purposes of this part. Such reports shall, at the same time, be included on the Department's website and any other publicly accessible database that lists economic development Programs.

§ 280.7 Removal from Program

- a. The commissioner shall remove a participant in the Program for failing to meet any of the requirements set forth in section 280.3(a) herein, or for failing to meet the requirements set forth in section 280.4 herein.
- b. If the commissioner has removed a participant in the Program pursuant to subdivision (a) of this section, the commissioner shall notify such participant of such removal in writing. Such notice of removal shall explain the reason or reasons for the removal from the Program.

§ 280.8 Advance tax credit payment option for the restaurant return-to-work tax credit and additional restaurant return-to-work tax credit

- a. With respect to the advance payment for the restaurant return-to-work program, [T] taxpayers who choose to use August 31, 2021 as the last date to calculate their average ending full-time employment and have received their certificate of tax credit by November 15, 2021, will have the option to request an advance payment of the amount of the restaurant return-to-work tax credit they are allowed under this Program. A taxpayer must submit such request to the Department of Taxation and Finance in the manner prescribed by the commissioner after it has been issued a certificate of tax credit by the Department of Economic Development pursuant to subdivision two of section four hundred seventy-four of the economic development law (or such certificate has been issued to a partnership, limited liability company or subchapter S corporation in which it is a partner, member or shareholder, respectively), but such request must be submitted no later than November 15, 2021.
- b. For those taxpayers who have requested an advance payment and for whom the commissioner of taxation and finance has determined eligible for this credit, the commissioner of taxation and finance shall advance a payment of the tax credit allowed to the taxpayer. However, in the case of a taxpayer subject to article nine-a of the Tax Law, such payment shall be equal to the amount of credit allowed to the taxpayer less twenty-five dollars. Such twenty-five dollars shall represent a partial payment of tax owed by the taxpayer under article nine-a, including any fixed dollar minimum owed under paragraph (d) of subdivision one of section two hundred ten of the Tax Law. When a taxpayer files its return for the taxable year,

such taxpayer shall properly reconcile the advance payment and any partial payment of fixed dollar minimum tax, if applicable, on the taxpayer's return.

c. With respect to the advance payment for the additional restaurant return-to-work program, taxpayers have the option to request an advance payment of the amount of the additional restaurant return-to-work tax credit they are allowed under this Program. A taxpayer must submit such request to the Department of Taxation and Finance in the manner prescribed by the commissioner after it has been issued a certificate of tax credit by the Department of Economic Development pursuant to subdivision two of section four hundred seventy-four of the economic development law (or such certificate has been issued to a partnership, limited liability company or subchapter S corporation in which it is a partner, member or shareholder, respectively), but such request must be submitted no later than September 30, 2022.

d. For those taxpayers who have requested an advance payment and for whom the commissioner of taxation and finance has determined eligible for this credit, the commissioner of taxation and finance shall advance a payment of the tax credit allowed to the taxpayer. However, in the case of a taxpayer subject to article nine-a of the Tax Law, such payment shall be equal to the amount of credit allowed to the taxpayer less twenty-five dollars. Such twenty-five dollars shall represent a partial payment of tax owed by the taxpayer under article nine-a, including any fixed dollar minimum owed under paragraph (d) of subdivision one of section two hundred ten of the Tax Law. When a taxpayer files its return for the taxable year, such taxpayer shall properly reconcile the advance payment and any partial payment of fixed dollar minimum tax, if applicable, on the taxpayer's return.

§ 280.9 Cap on tax credit

The total amount of tax credits listed on certificates of tax credit issued by the commissioner pursuant to this article may not exceed thirty-five million (\$35,000,000) dollars.