# Extensions and Employment Standard Changes: Understanding Updates to Ohio's Qualified Energy Project Tax Exemption

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One of the most important incentives in Ohio law to promote renewable energy projects arises under Ohio Revised Code (R.C.) Section 5727.75 (the QEP Statute), which enables certain renewable energy projects to be certified by the Ohio Department of Development (ODOD) as qualified energy projects (QEPs) and receive a real and personal property tax exemption in exchange for paying a PILOT (defined below). In order to receive the QEP exemption, the owner or lessee of a qualified energy project is required to meet certain conditions under the statute, including the obligation to make annual service payments in lieu of taxes (PILOTs).[i] As a practical matter, the QEP exemption is currently used to primarily support solar energy projects in Ohio, although wind projects can also qualify.

## How did House Bill 33 Change the QEP Statute?

On June 30, 2023, the Ohio General Assembly passed the State Operating Budget (HB 33). Among the many changes that HB 33 made to state law, were several key amendments to the QEP Statute, including: (1) granting at least a four-year extension (from December 31, 2024 until December 31, 2028), for a renewable energy project to apply to ODOD to be certified as a qualified energy project and take advantage of the QEP exemption; (2) lowering (for new applicants and existing applicants under certain circumstances) the required ratio of Ohio domiciled full-time equivalent (ODFTE) employees for a solar energy project from 80% to 70%; and (3) clarifying how the ODFTE employee ratio should be calculated, by excluding, for example, hours worked by supervisors.

- ***Extending the Application and Construction Start Deadline***

In the years since Ohio's QEP Statute was originally enacted, the QEP Statute has been amended on several occasions to extend the deadline for applicants to take advantage of its real and personal property tax exemption. HB 33 continues that trend by providing at least a four-year extension of the eligibility period for an applicant to (i) apply to ODOD for its project to be certified as a qualified energy project and (ii) start

construction.

Instead of being confronted with a December 31, 2024 deadline under the prior version of the QEP Statute, applicants can now apply on or before the later of (i) December 31, 2028 or (ii) the last day of the tax year preceding the tax year when the U.S. Treasury Secretary determines that the annual greenhouse gas emissions from U.S. energy production is equal to or less than 25% of the annual greenhouse gas emissions from U.S. energy production in calendar year 2022 (the Treasury Determination) in accordance with 26 USC §45Y.[ii] Aside from the potential Treasury Determination date, HB 33 effectively provides a minimum four-year extension for an applicant to submit an application to ODOD to have its project certified as a QEP.[iii]

HB 33 also provides applicants with at least a four-year extension of time to start construction or installation of the QEP, by moving that deadline from January 1, 2025 (under the prior version of the statute) to at least January 1, 2029.[iv]

- ***Reducing the Required Ratio of Ohio Domiciled Full-Time Equivalent Employees***

HB 33 allowed for a reduction in ODFTE employees from 80% to 70% on solar energy projects under certain conditions. Under the QEP Statute, a project must have a certain ratio (or minimum percentage) of ODFTE employees involved in the construction or installation of the energy project, based on the type of project being constructed.[v] Prior to HB 33, solar energy projects were uniformly required to maintain a ratio of not less than 80% ODFTE employees.[vi]

HB 33 changed this calculus and created two different pathways for projects to achieve the required ratio of ODFTE employees. These pathways differ based on whether the project's application date was before or after the effective date of HB 33, October 3, 2023. Projects that applied before HB 33 became effective can either (i) comply with the original 80% threshold or (ii) meet a lower 70% threshold if the project can certify to ODOD that the project will be subject to certain prevailing wage and apprenticeship ratio requirements outlined in the Internal Revenue Code.[vii] Projects that apply for QEP status after HB 33's effective date (and require County Commissioner approval with at least 20 MW of generation capacity) are uniformly required to meet the new 70% threshold and comply with the prevailing wage and apprenticeship requirements.

These prevailing wage and apprenticeship requirements align with provisions of the Inflation Reduction Act for renewable energy production tax credits. The prevailing wage requirement means that employees employed by the applicant must be paid federal prevailing wage rates for both (i) the construction of the project and (ii) the repair or alteration of the project within 10 years of the project being placed into service.[viii]

The apprenticeship requirement means that an applicant would need to ensure that the project satisfies an "applicable percentage" of hours worked by qualified apprentices relative to total labor hours for the construction, alteration or repair work of the project (including work performed by any contractor or subcontractor).[ix] Qualified apprentices are individuals participating in an apprenticeship program registered with the federal government or a state government.[x] These ratios depend on the construction start date of the facility, with the required ratio being:

- 10% of labor hours performed for projects that began construction before January 1, 2023;
- 5% for projects that begin construction between January 1, 2023 and December 31, 2023; and
- 15% for projects that begin construction on or after January 1, 2024.[xi]

- ***Clarifying the Ratio of Ohio Domiciled Full-Time Equivalent Employees***

HB 33 also clarified how to calculate the ratio of ODFTE employees. Specifically, it amended the definition of "full-time equivalent employee" in the QEP Statute so that it now includes only hours worked at the QEP site "and devoted to site preparation or protection, construction and installation and the unloading and distribution of materials" while excluding hours worked by supervisory personnel and certain other employees.[xii] This amendment reflects a significant change from the prior version of the QEP Statute, which was silent on the question of what it means for an employee to be involved in the construction or installation of the project. Going forward, the calculation of the ODFTE employee ratio should not include hours worked by employees specifically excluded by HB 33.

## What New Challenges have been Created by HB 33 for Renewable Energy Developers in Ohio?

Although offering many benefits, the amendment to the QEP Statute creates some significant uncertainty for renewable energy developers in Ohio seeking to comply with the statute.

- ***U.S. Treasury Secretary's Greenhouse Gas Determination: Undefined Deadlines for Project Applications and Project Construction Starts***

Under the amendment to the QEP Statute, the deadlines to either file an application or start construction are each based on the definition of "applicable year," meaning the later of (i) tax year 2029 or (ii) the tax year when the U.S. Treasury Secretary makes a determination about the level of greenhouse gas emissions "in accordance with section 45Y of the Internal Revenue Code" (i.e., the Treasury Determination).[xiii] This definition of applicable year is crucial because (i) the QEP exemption lasts through the "applicable year," (ii) the exemption application must be made "on or before the last day of the tax year preceding the applicable year" and (iii) construction of the renewable energy project must begin before the first day of the applicable year.[xiv] This definition of "applicable year" extends the deadlines in the prior version of the statute by at least four years, with the potential for the extension to be even longer depending on the date of the Treasury Determination.

The second part of the definition of "applicable year," which is based on the Treasury Determination, could create uncertainty because QEP applicants may not have sufficient notice of when that determination will occur. For example, if the Treasury Secretary were to make the greenhouse gas determination in November of 2031, then 2031 would become the applicable year. A solar energy developer who had planned to file a QEP application in 2031 might suddenly have missed the deadline, because they would have had to have filed their QEP application in 2030 (i.e., "on or before the last day of the tax year preceding the applicable year,").[xv] Likewise, an applicant who had planned to start construction in December of 2031 would potentially no longer have access to the exemption, because they would have had to have begun construction before the first day of the applicable year, in this case January 1, 2031.[xvi] Thus, the

amendment is drafted in such a way that it could create uncertainty for potential QEP applicants who are hoping to take advantage of the statute's tax exemption after tax year 2029.

- ***Forward-Looking Compliance with Prevailing Wage and Apprenticeship Requirements for Existing QEP Applicants***

Solar energy projects that apply for QEP status after October 3, 2023, will have to comply with federal prevailing wage and apprenticeship requirements in order to receive the real and personal property tax exemptions, though they will only have to meet a 70% ODFTE employee ratio.[xvii] Applicants with solar energy projects who filed for QEP status before October 3, 2023, will have the option to move from their 80% ODFTE ratio to a lower 70% ratio, as long as they "certify to the director of development that the project will be voluntarily subject to the [new prevailing wage and apprenticeship requirements]."[xviii]

This optional certification provision to qualify for the lower ODFTE employee requirement raises two important, related questions: (i) when does an applicant have to certify future compliance with the prevailing wage and apprenticeship requirements in order to take advantage of the lower 70% ODFTE employee ratio, and (ii) if an applicant files a prevailing wage and apprenticeship certification, is that obligation only prospective? These questions are especially important for applicants who may have already applied for QEP status and have begun construction, but are unsure if they can qualify for the reduced ODFTE employee ratio. For example, there could be two applicants who each applied for QEP status before HB 33 went into effect, but one applicant has just broken ground on a solar energy project and the other has not started construction. Under that scenario, it is clear that the applicant who has not yet begun construction can make the prevailing wage and apprenticeship certification. However, can the applicant who has already started construction certify to ODOD that for the remainder of the project construction period they will comply with the prevailing wage and apprenticeship requirements in a good faith effort to access the lower ODFTE employee ratio, even if they did not follow the prevailing wage and/or apprenticeship requirements prior to the certification? While the Ohio Administrative Code makes it clear that the ODFTE employee ratio requirement is based on the entirety of the installation and construction process under the progress report and completion report requirements, there is no similar clarification about whether the new prevailing wage and apprenticeship requirements must be in place for the entirety of the installation and construction process or just during the time after the applicant makes the certification to the director of development. Because having access to the lower ODFTE employee ratio is potentially so valuable with the current labor market, existing applicants would benefit from having further guidance to these questions about the prevailing wage and apprenticeship certification in order to better plan for their workforce needs going forward.

- ***Unclear "Full-Time Equivalent Employee" Definition for Managers and Supervisors***

A key feature of the QEP Statute is its focus on individual projects having to employ a sufficient ratio of Ohio-domiciled workforce. This ratio must be measured and reported to the State both during construction and after a QEP is placed into service (i.e., becomes capable of producing electricity).[xix] HB 33 clarified the definition of "full-time equivalent" (FTE) employees to exclude the hours worked by individuals in certain roles, including superintendents, owners, persons transporting materials or other persons to a job site.[xx] Crucially, this definition also excludes "persons employed in a bona fide executive, management, supervisory, or administrative capacity" from the definition of FTE employee, but does not take further steps to define these roles.[xxi]

This amended definition of FTE employee creates uncertainty with respect to certain management or supervisory roles that could exist at a given QEP job site. For example, would a foreman, a shift lead or a more experienced electrician supervising apprentice electricians fall into the "management" or "supervisory" category and thus be excluded from the definition of an FTE employee? The answer to this question has important implications for how a QEP solar energy project meets its Ohio domiciled labor requirement (i.e., the 70% ODFTE employee ratio for new applicants). For example, if a foreman is not Ohio-domiciled, then it would be advantageous for an applicant to exclude that foreman from its FTE calculation in order to more easily satisfy the ODFTE requirement (or if that foreman is Ohio domiciled include them in the calculation). Without offering any definition of who may qualify as a manager or supervisor, HB 33 may create some uncertainty and incentivize applicants to make judgments that lean toward enabling them to satisfy the Ohio domiciled labor requirement (i.e., by including in the FTE employee calculation employees with some supervisory responsibilities if they are also Ohio domiciled – or excluding them if they are not).

## Takeaways from Ohio's New Amendment to the QEP Statute

HB 33 extended the window for applicants to take advantage of the QEP exemption, and created several pathways for qualified energy projects to satisfy the required Ohio domiciled labor percentage at a lower 70% threshold. On the other hand, the amendment also imposed new hurdles by (i) making applicants after the date of the amendment follow certain federal prevailing wage and apprenticeship requirements, and (ii) raising difficult compliance questions that could benefit from further legislation or administrative guidance. Nevertheless, on balance, the amendment to the QEP Statute promotes qualified energy projects, and, in particular, the four-year extension of the window to apply to be certified as a qualified energy project highlights the value that the Ohio General Assembly continues to place on the QEP exemption as an important policy tool to promote renewable energy development in the State.

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[i] The annual PILOT payment includes two components: (1) a mandatory "service payment in lieu of taxes" under R.C. 5727.75(G)(1), which equals "[i]n the case of a solar energy project, seven thousand dollars per megawatt of nameplate capacity located in the county"; and (2) an additional payment that the county may assess which is capped at two thousand dollars per megawatt ("MW"). *See* R.C. 5727.75(E)(1)(b). The total of these combined payments cannot exceed $9,000/MW of nameplate capacity located in the county. *Id.* Counties almost uniformly impose the maximum annual PILOT payment allowed of $9,000/MW in order to approve the application of a qualified energy project.

[ii] *See* R.C. 5727.75(A)(7) and (B)(1)(a).

[iii] This application deadline could be further extended beyond December 31, 2028, in the event that the certification by the Treasury Secretary referenced in R.C. 5727.75(A)(7) takes place after tax year 2029.

[iv] *See* R.C. 5727.75(B)(1)(b).

[v] R.C. 5727.75(F)(6).

[vi] An employee is considered to be Ohio-domiciled if that "person's permanent residence is in the state of Ohio." O.A.C. 122:23-1-01(A)(8).

[vii] *See* R.C. 5727.75(F)(6).

[viii] *See* 26 USC §45(b)(7)(A).

[ix] *See* 26 USC §45(b)(8)(A)(i).

[x] *See* 26 USC §45(8)(E)(ii); *see also* 26 USC §3131(E)(3)(B).

[xi] *See* 26 USC §45(b)(8)(A)(ii).

[xii] R.C. 5727.75(A)(4).

[xiii] R.C. 5727.75(A)(7).

[xiv] R.C. 5727.75(B)(1).

[xv] *See id.*

[xvi] *See id.*

[xvii] R.C. 5727.75(E)(2)(d); R.C. 5727.75(F)(6)(b).

[xviii] R.C. 5727.75(F)(6)(a).

[xix] *See* O.A.C. 122:23-1-04.

[xx] *See* R.C. 5727.75(A)(4).

[xxi] *See id.*