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**INTERESTED PARTY TESTIMONY ON HOUSE BILL 157**

**Before the House Ways and Means Committee**

March 10, 2021

Good morning Chairman Merrin, Vice Chairman Riedel, Ranking Member Sobecki and members of the House Ways and Means Committee. My name is Dave Froling. I am a state and local tax partner with the Vorys, Sater, Seymour and Pease LLP law firm. I am pleased to offer this testimony today on behalf of the Council and its more than 7,000 members.

The Council appreciates the Committee's interest in repealing Section 29 of House Bill 197. We are all anxious to put the pandemic behind us and see things return to normal. Nonetheless, careful consideration needs to be given to repealing Section 29. All the sound reasons for enacting it remain true today. It was enormously helpful to all employers and remains so. Not enacting Section 29 would have created serious problems for employers, employees, and cities. Repealing it prematurely would create the same serious problems for employers, employees, and cities that Section 29 solved.

Let us not quickly forget the past. Roughly one year ago, Governor DeWine ordered all non-essential employees to work from home. Given that Ohio has roughly 700 municipalities that impose an income tax, that Ohio law requires employers to withhold city income tax to the city where the employee works, and that Ohio law does not require employers to withhold city income tax to where the employee lives, the Governor's order requiring all non-essential

employees to work from home immediately expanded the number of cities an employer would have to withhold taxes for considerably. For employers that have hundreds of employees, the compliance problems were obvious. No employer could recode its software, change its compliance procedures, and test the same to ensure all changes were done correctly on such short notice. To think that any employer could do this by the next payroll period after the Governor's order is disregarding an impossibility. Not to be overlooked is that many employers would have to incur significant expense in making these changes as many employers would have to rely on outside service providers for assistance. Fortunately, through the Council's leadership and the leadership of other interested parties, the Ohio General Assembly enacted Section 29.

There seems to be some misinformation in the public domain about the lawfulness of Section 29. *There is nothing illegal about Section 29.* The Committee needs to understand the employer withholding tax is wholly different from the personal income tax. In light of the Governor's order, there is nothing illegal about requiring employers to withhold and remit city income taxes just to the employee's principal place of work. That in and of itself does not mean the employee owes tax to their work city, and nothing about Section 29 precludes an employee from requesting a refund of those withheld taxes. Indeed, the work city should refund those taxes to the employees given two Ohio Supreme Court decisions from 2015. That said, the employee may not be able to keep 100% of that refund. Employees living in a township can do so but employees living in a city will have to give some portion, or all, of their refund to their city of residence. Undoubtedly, there are a lot of employees seeking refunds but certainly there are a lot of employees who will not pursue refunds because the financial reward is modest or because there is no financial reward at all.

Another bit of misinformation in the public domain is that Section 29 was enacted for the business community. That is true in part. That said, it is more accurate to say Section 29 was

enacted for **all employers**. In this regard, the Governor's order requiring all non-essential employees to work from home applied to all employers. Clearly the order applied to private businesses--large, medium, and small--but equally true is that the Governor's order applied to the federal government, state government, county government, city government, colleges and universities, local school districts, hospitals, and not for profit businesses.<sup>1</sup> Not enacting Section 29 would have adversely affected all these employers in addition to the private sector.

Repealing Section 29, as HB 157 proposes to do in its current form, is based (seemingly) on a faulty assumption, which is that all non-essential employees will return to their principal place of work when the Governor's order expires. If that assumption proved to be true, then HB 157 as written would be fine, however, the retailers that the Council has spoken to indicate that assumption is wholly inaccurate. Moreover, the magnitude of that inaccuracy cannot be understated. Here is what the Council has learned: some employees will be asked to spend 100% of their time at the employer's principal place of work; some employees will be permanently assigned to work from home; and some employees will work part-time at the retailer's principal place of work and part-time from home. From my private practice, I have found the aforementioned to be true with respect to a wide variety of employers, and as the Committee might expect, the percentage of employees falling within each of the three categories will vary by employer. That said, the number of employees who will be working part-time at the employer's office and part-time from home is far from insignificant for at least the next year or two.

Asking the business community when the business community can be ready to withhold city income taxes to an employee's city of residence is a fair question to ask, but this same

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<sup>1</sup> [https://en.wikipedia.org/wiki/List\\_of\\_largest\\_Central\\_Ohio\\_employers](https://en.wikipedia.org/wiki/List_of_largest_Central_Ohio_employers). Five of the ten largest employers in central Ohio are public employers.

question needs to be asked of the federal government, state government, county government, city government, colleges, universities, local school districts, hospitals, and not for profit businesses. The effective date needs to take into account the readiness of all these employers. The Council simply cannot speculate when every employer will be ready. Undoubtedly, some will be ready by the end of this year but undoubtedly, many will not.

The readiness of employers has a great impact on employees and city tax administrators. Accordingly, the question should not be, “How quickly can Section 29 be repealed?” Instead, the question that should be asked is, “How long should Section 29 be extended beyond its presently set expiration date?” That is the proper question because repealing Section 29 raises additional issues of which the Committee needs to be aware.

1. How does the repeal of Section 29 impact a business’ net profits tax compliance obligation to the employee’s city of residence? The Council submits the business should not have a net profits tax filing obligation if the business’ only connection to the employee’s city of residence is having an employee residing there. HB 157 should include a safe harbor to make this clear.
2. For the employees working part-time from home and part-time from the principal place of work, HB 157 should provide a safe harbor for employers in the event the work city and/or the residence city contest the amounts withheld and remitted to each city.
3. Ohio’s largest cities rely heavily on nonresidents commuting into their city to work. The same is true for certain suburbs. In the Columbus area, Dublin, New Albany, and Reynoldsburg come easily to mind. Employers chose to locate in the cities they did for a host of reasons, some of which related to the city’s ability to provide certain services, resources, amenities, and infrastructure. If employers are to remit withholding taxes to the employees’ city of residence in lieu of the employee’s principal place of work city,

then what will the General Assembly do to ensure these large commuter cities have adequate revenue to provide the services, resources, amenities, and infrastructure that these employers need to be successful?

4. Many employers have job creation tax credits and/or economic incentives agreements with the city in which the employer is based. What is to become of these credits and agreements if Section 29 is repealed and employers have to withhold to the employee's city of residence?
5. HB 157 should address the process for employees to obtain a refund from their principal place of work city. As it stands now, many cities require the employer to make certain certifications. The current process is very cumbersome and time consuming for employers and should be streamlined.

Repealing Section 29 before all employers are ready, and without addressing the above issues, is a recipe for disaster for employers, employees, and city tax administrators. Invariably, mistakes will be made and it will be time consuming to correct them. The Council stands ready to work with the General Assembly to make sure Section 29 is repealed responsibly.

This concludes my testimony. Thank you for the opportunity to share the Council's perspectives on HB 157. I would be happy to answer any questions you may have.