

What to Do With Your Incentive Agreements in This Challenging COVID-19 Time

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CLIENT ALERT | 3.23.2020

In this time of broad government actions due to a declared pandemic emergency, it is important to examine your incentive agreements to understand the potential risks your company faces if your company is unable to perform key obligations. First, review your incentive agreements to confirm carefully and with specificity your obligations. Second, closely review the language of your agreements to determine if any of your obligations can be delayed due to a “force majeure” provision, a “market conditions” provision, or a similar provision. Third, as soon as the crisis begins to abate, and perhaps sooner in certain situations, contact your incentive counterparty to discuss potential options.

Your incentive agreements may have ongoing requirements, such as minimum payroll and full-time equivalent employee benchmarks. Some incentive agreements, though, require that performance meet minimum levels only through an evaluation date, and thereafter the company’s performance impacts the value of the incentive but not whether you are in breach. In either case, it is important to understand the agreement, whether you are at risk of being in breach due to the pandemic, and what consequences there are, if any, for a breach.

After you have identified whether there is a potential breach of the agreement, review your agreements to see if they have a “force majeure” provision or a similar “market conditions” provision. In some agreements, this section addresses what happens if performance under an agreement becomes delayed or impossible through outside forces. For example, government orders, such as the shutdown orders issued in multiple states (including Ohio) in the last several days, could directly or indirectly prohibit business operations or restrict timely access to needed services to complete your project, such as governmental permits or inspection approvals. Some agreements provide force majeure provisions that temporarily relieve a party from its performance obligations. This is a common contractual provision, tolling or delaying obligations due to unforeseen events beyond the party’s control. Those unforeseen events, often listed as acts of god or war or terrorism, may include acts of governments such as a mandated

shutdown of private and/or public services, prohibitions against gathering, or the other restrictions that practically cease interstate commerce. To preserve the protections of force majeure under a contract, you may be required to provide notice to the other party of the delaying event (e.g., a specific government action), or take other steps to mitigate the situation. Failing to timely comply with any notice required under the provision could waive your contract rights.

Third, upon review of your incentive agreements and assessment of your risk of breach, you may need to contact your counterparty. For instance, if you have a loan with a payment coming due that you cannot make, you will want to contact the lender to discuss a forbearance. Given the broad shutdown being ordered by the government, our experience suggests that economic development entities will want to work with you to minimize defaults or provide a reasonable accommodation. If your potential breach is not until later in the year (for a payroll or jobs default measured annually), you should still plan to contact your economic development counterparty now or as soon as the crisis abates. We can assist you in developing a game plan and a proposal to address the potential breach.

If you need assistance with analyzing your rights and obligations under your incentive contract, determining if a force majeure provision may be applicable under your agreement, or preparing a strategy for working with your counterparty to address a potential economic development agreement breach, please contact Scott Ziance, Sean Byrne or your regular Vorys attorney.

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Vorys COVID-19 Task Force

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.