

Economic Development Incentives

AUTOMOTIVE INDUSTRY EXPANSIONS/CONSOLIDATIONS

Whether considering an expansion or consolidation of an automotive business, the company should always consider economic development incentives in its site location analysis. Many states have specifically targeted advanced manufacturing and headquarters projects as those it wishes to expand in their state. Available incentives can often be a major driver in choosing one state over another as a final site location for a facility. The availability of the types of incentives and their value to a particular project vary based on the particular project. Potential incentives include those available at the federal, state, and local levels.

FEDERAL

New Markets Tax Credits If the project will be located in a low income area, new markets tax credits may be available where gap financing is needed. This program can provide below-market financing, or can be structured in a manner that allows the business operating in a low income community to “sell” federal income tax credits to an investor who can use the credits to offset its federal income tax.

Specialized Industry Incentives The Departments of Energy, Labor, Transportation, and Housing and Urban Development may have targeted grant programs that could assist with general project costs, such as extending necessary infrastructure to a new manufacturing location.

Federal Tax Credits for Hiring There are federal tax credits available for hiring targeted populations, including disabled veterans and veterans returning from Iraq and Afghanistan.

STATE

Sales Tax Exemptions Some states may offer sales tax exemptions on construction materials or on new machinery and equipment for new projects.

CORPORATE

Income Tax Credits Some states will provide corporate tax credits for job creation or capital investment. If the tax credit exceeds the company's tax liability, some states will refund the excess. Other states will not provide a refund, but will provide a carryforward of unused tax credits for a period of years. In some cases, the employee withholding tax withheld by the employer will be refunded to the company for a period of years, either in addition to a corporate income tax credit or in lieu of such a credit. In other cases, the value of the credit may be a set dollar amount per new job created.

Infrastructure Grants There may be grant funding available at the state level for items such as site preparation, road work, or sewer and water line extensions to the site.

Discretionary Grant Funding Many states have a discretionary “deal closing” fund for projects where there is a significant gap between that state and another potential site location.

Renaissance/Enterprise/Urban Revitalization Zones These sites are generally designated at the state level. Locating within the site, or hiring from residents within the site, provide a variety of benefits to the employer. Generally, the sites are designated due to economic distress of the area.

Job Training Grants or Reimbursements Most states provide a form of job training assistance for new employees. In some states this is a per job reimbursement amount that can be used to offset wages of the new employee while they are in training. In other states, there is a reimbursement of actual training costs incurred by the company. In still other states, there are in-kind job training programs, in which the local workforce development board or local community colleges provide the training at no or a reduced cost to the company.

LOCAL

Property Tax Abatements or Rebates Municipalities may be able to offer a partial or total tax abatement for new real and personal property investment in a facility for a period of years. In some states, property tax abatements are not allowed, but there may be the availability of offsetting grants or the ability to use the incremental increase in tax revenue to the municipality as a revenue source for the repayment of bonds that may be issued in order to provide up-front revenue for the project.

Sales Tax Exemptions In states that also have a local option sales tax, the municipalities may offer exemption from the local option sales tax on construction materials or on new machinery and equipment for new projects.

Inventory Tax/Freeport Exemptions In some states, property tax includes a tax on inventory in the state. In those states, the locality may, for certain projects, provide a Freeport exemption so that the facility's inventory is not taxed if it leaves the state within a certain defined period of time.

THE BOTTOM LINE

As automotive companies look to the future, they should consider whether their strategic plans include expansion or consolidation. It is essential to evaluate the value of these potential incentives early in the site location process, as it may affect a company's final site location decision.

Miller Canfield's Economic Incentives team has years of experience assisting clients with the entire process, from analyzing potential site costs to negotiating incentive agreements to ensuring the company is aware of its ongoing compliance obligations.

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Purchaser's Guide for Conducting Environmental Due Diligence

Environmental due diligence plays an important role in corporate transactions. If appropriate environmental due diligence is not done, the parties to a transaction may be faced with unexpected liabilities. Here are a few due diligence tips to help a purchaser avoid liability and effectively negotiate environmental matters.

Negotiate a Confidentiality Agreement A confidentiality agreement is an effective way for a purchaser to establish the scope, process, and limitations of the due diligence review before documents are exchanged and site visits are scheduled.

- » In addition to protecting information provided by the seller, the confidentiality agreement should also protect information generated or prepared by the purchaser as part of its due diligence review.
- » The confidentiality agreement should describe a process for the return or destruction of all due diligence documents and reports if the transaction is not completed.
- » The confidentiality agreement should establish the procedure for reporting adverse environmental conditions at the property and/or environmental compliance violations that are discovered during the due diligence review so as to best position the parties with respect to governmental disclosures.

Conduct Environmental Due Diligence Early There are several reasons why conducting environmental due diligence during the early stages of a transaction is beneficial.

- » The innocent purchaser and bona fide prospective purchaser defenses to liability that are available pursuant to federal law require that a new owner complete due diligence before acquisition of the property.

- » The earlier the purchaser starts the environmental due diligence process, the more time the purchaser will have to examine all of its options to fairly allocate the liabilities identified during document reviews, site visits, and investigations. The purchaser will be in a better position to draft indemnities, determine appropriate environmental escrow amounts, and negotiate the pricing for the transaction. Starting the due diligence early will also give the purchaser enough time to conduct a Phase II Environmental Site Assessment (ESA) if one is necessary.
- » Many lenders have requirements for environmental due diligence that must be met before they will authorize financing for the transaction. For example, some lenders require borrowers to use an environmental consultant pre-approved by the lender.
- » The information can be used to apply for federal or state financial assistance that is available to parties that purchase Brownfield properties or properties with contamination from a known source, such as a dry cleaner or gas station. This type of assistance may require significant lead time.
- » The information can be used to obtain environmental insurance.

Request a List of Environmental Documents and Information from the Seller

- » The request should include, but is not limited to, a request for current environmental permits, compliance reports, government notices and violations, prior environmental reports, a description of response actions or remediation projects, a description of claims by any government agency or third party, contingent liabilities, and the company's environmental reserves.
- » A supplemental list with specific questions or documents may be submitted to the seller following the initial document review.

Engage an Environmental Consultant to Conduct a Phase I ESA and Environmental Compliance Review

- » Your attorney should retain a consultant on your behalf so opinions and conclusions in the consultant's reports are protected by the attorney-client and work product privileges. To maintain the privileges, clients should only speak with the environmental consultant when the attorney is present. An attorney should also review the consultant's contract related to the performance of the Phase I ESA and environmental compliance review to ensure the proper scope of work and to negotiate better terms. Many times consultants will try to limit their liability to the cost of the services or \$50,000, even though the consultant has insurance for greater amounts.
- » Do not only rely on the seller's previous Phase I ESA(s) or environmental compliance review(s) or any Phase I ESA or compliance review that is more than six months old. Relying on such reports does not constitute sufficient inquiry into the history and current operations at the property and will eliminate any defenses to environmental liability available to the purchaser under federal or state law.
- » If a Phase I ESA and/or environmental compliance review has been completed and is less than six months old, ask the environmental consultant who completed the report to grant the purchaser and all related entities the ability to rely on the report(s). A specific reliance letter should be obtained from the environmental consultant.
- » Consider using a different environmental consultant than seller used in the past. Deciding which environmental consultant to use and whether to rely on previous reports, depends on the circumstances of the transaction and should be examined closely with the assistance of legal counsel.

- » Find a consultant who has experience and resources in the localities where the facilities included in the transaction are located. Generally local consultants will be more efficient and less costly.
- » Generally plan to receive verbal results of the Phase I ESA and environmental compliance review within one to two weeks and anticipate another two weeks for the written report.

Negotiate a Site Access Agreement Once the purchaser has completed its initial document review and engages a consultant to conduct a Phase I ESA, environmental compliance review and/or potentially a Phase II ESA, a site visit will likely be necessary.

- » The site access agreement should establish the purchaser's reason for accessing the property and should inform the seller about the scope of work and the schedule for completing the work.
- » The purchaser should ensure that the consultant has adequate insurance to cover any mishaps during site access and should include related provisions in the access agreement.

Consider How the Environmental Information can Influence the Transaction

- » The results of the environmental due diligence can influence the structure of the transaction (e.g., stock versus asset purchase).
- » As previously mentioned, appropriate environmental due diligence will help a purchaser draft environmental indemnities, determine if an environmental escrow should be established, or if environmental insurance is necessary.
- » Good environmental due diligence will provide the purchaser with information it can use to identify issues and costs associated with post-closing transition and integration matters and factor these issues into the deal.

- » The information can be used to evaluate the existing facilities in light of the purchaser's business needs and determine the potential environmental implications and costs associated with retrofitting, streamlining, or closing a facility.

Consider How Regulatory and Compliance Information Should be Factored into the Transaction

- » Identify environmental permits or agreements that must be transferred to a new owner prior to the transfer of ownership or control and complete the requirements to transfer the permits in accordance with applicable law. Also identify permits and required timelines for post-closing environmental permit transfers.
- » Subject to federal and state audit policy requirements, if environmental violations are discovered during pre-acquisition due diligence, then the seller or purchaser may have the opportunity to voluntarily report the violations and obtain a mitigated penalty and/or reduction of fines. If violations are discovered by the U.S. Environmental Protection Agency or a state environmental agency following the transfer of ownership or control, then the purchaser could be subject to the full enforcement action.
- » Further, the environmental due diligence information can be used to assess Securities and Exchange Commission (SEC) disclosure obligations.

No two transactions are alike and the purchaser should develop an approach to environmental due diligence that fits with the facts and circumstances of the particular transaction. These tips will help the purchaser develop an effective strategy for conducting sufficient environmental due diligence that will appropriately allocate environmental liability and add value to negotiations with the seller.

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Antitrust Investigation Highlights Need for Compliance Programs

The U.S. Department of Justice and antitrust enforcement agencies continue to investigate alleged price fixing involving automotive electrical components. Recent announcements that three companies and several executives have pled guilty to price fixing prompted lawyers to file at least 40 civil lawsuits in federal courts around the country. The suits seek money damages on behalf of purchasers who bought wire harnesses directly or indirectly from suppliers believed to be part of the investigation. A federal judicial panel has conditionally transferred a number of the cases to the U.S. District Court for the Eastern District of Michigan where many of the cases are already pending.

The criminal investigation and civil lawsuits illustrate the need for antitrust compliance programs and compliance audits. Miller Canfield's antitrust lawyers offer compliance training and audits to clients in many industries. Call us if you'd like to learn more.

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National Labor Relations Board Update

The NLRB finished 2011 preparing to operate as a two-person board with the departure of board member Craig Becker, whose recess appointment expired on January 3, 2012. Because the Senate had not approved President Obama's nominations to the board, and Senate Republicans threatened to hold pro forma sessions throughout the Christmas holiday break, it appeared that the board would be reduced to two commissioners for the duration of 2012.

OBAMA MAKES RECESS APPOINTMENTS TO FILL THE BOARD

However, on January 4, 2012, President Obama made three recess appointments to the NLRB. These appointments are subject to legal challenge, primarily on

the basis that U.S. Senate Republican leaders held pro forma sessions of the legislature during the holiday recess specifically to prevent the President from making recess appointments. Appointed to the board were Sharon Block, Terence Flynn, and Richard Griffin. They join current members Brian Hayes and Mark Pearce to form the five person, majority Democratic (3-2) board.

Prior to the appointments, the board acted on the following major issues:

THE NLRA RIGHTS POSTING REQUIREMENT

On December 23, 2011, the National Labor Relations Board (NLRB) further postponed the implementation of its new employee rights posting requirement. The posting rule requires employers to post a notice, which in addition to unionized employers, reaches most non-unionized employers as well.

Employers should be aware that the NLRB considers failure to post the notice to be an unfair labor practice (ULP). According to the NLRB, failing to post the notice interferes with employees' rights to engage in concerted activity under sections 7 and 8(a)(1) of the Act. 29 U.S.C. §§ 157-158. The NLRB expects most failures to post will be due to the employer's unawareness of the rule, and that charges will usually be dropped upon compliance. Any failure to meet the posting requirements may still allow the NLRB to extend the six-month statute of limitations for employees to file other kinds of ULP charges, unless the employee otherwise knew about his or her rights.

The decision to postpone the implementation date was made after oral argument on December 19 in consolidated lawsuits brought by the National Association of Manufacturers and National Federation of Independent Businesses, among other groups opposing the posting requirement. U.S. District Court Judge Amy Berman Jackson asserted that the previous January 31 deadline did not provide her enough time to thoroughly review the arguments and specifically requested that the NLRB postpone the implementation date. The new effective date of the posting requirement is April 30, 2012.

ELECTION RULE CHANGES

On December 22, 2011, the NLRB issued final rules designed to reduce delays and litigation relating to representation elections. The rules will become effective April 30, 2012. The changes include seven primary amendments to the election rules. They include:

1. Amending board regulations to state that the purpose of pre-election hearings described in Section 9(c) of the National Labor Relations Act is to determine whether a question concerning union representation exists that should be resolved in a secret ballot election.
2. Giving NLRB hearing officers authority to limit the presentation of evidence in such a hearing to genuine issues of fact material to the existence of a question concerning representation.
3. Providing for post-hearing briefs with the permission of a hearing officer, rather than as a matter of right.
4. Amending Section 102.67 and Section 102.69 of the board's rules to eliminate a party's right to seek board review of regional directors' pre-election rulings while allowing a party to seek post-election review of such rulings.
5. Eliminating language in the NLRB's current statement of procedure that recommends a regional director not schedule balloting within 25 days of directing an election.
6. Amending Section 102.65 of the board's rules to provide that requests for special permission to appeal a regional director's pre-election ruling will be granted only in extraordinary circumstances.
7. Amending board rules to make NLRB review of post-election disputes discretionary.

IMPACT ON AUTOMOTIVE COMPANIES

While all three of these issues are being challenged in the courts, they significantly impact the landscape of federal labor law. The recess appointments will keep the board functioning and able to issue decisions throughout 2012, which it would not have been able to do without the appointments. The NLRB rights posting will require employers, union and non-union alike, to display the posting or risk being charged with an unfair labor practice and/or extending the statute of limitations for unfair labor practice charges. Finally, the election rule changes will require employers to maintain a higher level of vigilance and to react to a union election petition in a very tight time frame. The election changes also provide fewer avenues to challenge election petitions, so employers will need to be prepared to present a quick, coordinated response to union organizing campaigns.

Miller Canfield will continue to update employers on these and other board actions as they and the legal challenges play out.

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