

## **GIL 29-20-1 Tax Incentives: Effect of the COVID-19 National Emergency on Recapture Under the Nebraska Advantage Act**

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April 22, 2020

Dear XXXX,

You have asked whether the COVID-19 pandemic and the subsequent declaration of a national emergency is sufficient to invoke [Neb. Rev. Stat. § 77-5727\(9\)](#) to relieve Nebraska Advantage Act project-holders who fail to maintain the required employment or investment levels of their obligation to repay all or a portion of the tax incentive benefits they have previously received. Because of the nature of the question asked, this General Information Letter (GIL) is being provided in response.

GILs address general questions; provide analysis of issues; and direct taxpayers to the Nebraska statutes, Nebraska Department of Revenue (DOR) regulations, revenue rulings, or other sources of information to help answer a question. A GIL is a statement of current DOR policy, and taxpayers may rely on DOR to follow the principles or procedures described in a GIL until it is rescinded or superseded. You may also find current regulations, revenue rulings, information guides, taxpayer rulings, and other GILs that may be helpful to you at [revenue.nebraska.gov](http://revenue.nebraska.gov).

The Nebraska Advantage Act (Act) provides that all or a portion of tax incentives previously earned shall be recaptured if the project-holder fails to meet<sup>1</sup> the required levels of employment or investment by the end of the attainment period or fails to maintain those levels for the entire entitlement period. See [Neb. Rev. Stat. § 77-5727\(1\)](#). The Act also contains a force majeure provision that excuses the project-holder's failure to maintain the required employment and investment levels under specific circumstances. The Act specifically provides that "[t]he recapture required by [[Neb. Rev. Stat. § 77-5727](#)] shall not occur if the failure to maintain the required levels of employment or investment was caused by an act of God or national emergency." [Neb. Rev. Stat. § 77-5727\(9\)](#). An act of God or national emergency as provided for in the statute is the "triggering event."

To avoid recapture under the force majeure provision, the project-holder must show both that (1) a triggering event occurred, and (2) the project-holder's failure to maintain required employment or investment levels was caused by the triggering event. On March 13, 2020, President Trump declared a national emergency as a result of the COVID-19 pandemic. DOR considers this to be a triggering event pursuant to [Neb. Rev. Stat. § 77-5727\(9\)](#). To avoid recapture under the Act, the project-holder must demonstrate that the national emergency was the cause of its failure to maintain employment or investment.

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<sup>1</sup> Project-holders in specific tiers are permitted to receive a property tax benefit prior to meeting investment and employment levels. The discussion of a project-holder's failure to meet levels in this GIL refers only to these situations. See [Neb. Rev. Stat. § 77-5727\(1\)\(b\)](#), which provides that "[i]n the case of a taxpayer who has failed to meet the required levels of investment or employment within the required time period, all reduction in the personal property tax because of the act shall be recaptured.

In contract law, a force majeure provision “allocates the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled.” *Blue Creek Farm, Inc. v. Aurora Co-op. Elevator Co.*, 259 Neb. 1032, 1034 (Neb. 2000). The test to invoke such provision is, generally, “whether under the particular circumstances there was such an insuperable interference occurring without the parties’ intervention as could not have been prevented by prudence, diligence and care.” *First Data Resources v. International Gateway Exchange*, 2004 WL 2187566 at \*7 (D. Neb. Sept. 28, 2004); see also, *Great Lakes Gas Transmission Ltd. Partnership v. Essar Steel Minnesota, LLC*, (871 F.Supp.2d 843, 852 (D. Minn. 2012). The Act makes it clear that the burden is on the project-holder to show that its failure to maintain the required levels was not within its control but was caused by the triggering event. Neb. Rev. Stat. § 77-5727(9).

To demonstrate that failure to maintain levels was caused by the triggering event, a project-holder must provide evidence that its failure was the direct result of forces beyond its control including, but not limited to, a government order to cease or reduce operations, or a directed health measure that prevented the business from continuing its usual operations. The force majeure clause does not excuse performance on the basis of financial hardship or where the failure to maintain levels was the result of a business decision within the control of the project-holder. *Elavon, Inc. v. Wachovia Bank, Nat. Ass’n*, 841 F.Supp.2d 1298, 1307-08 (2011) (finding that defendant could not avail itself of the force majeure clause despite the economic perils that faced the banking industry because the decision to violate the contract was well within its control); *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 88 A.D.3d 1224, 1226, 931 N.Y.S.2d 436, 438 (2011) (finding that defendant could not avail itself of the force majeure clause even though it had no control over the economic downturn where defendant had options, though limited, and made the calculated choice to allocate funds to the payment of its debts rather than to perform under the contract). Therefore, the decision to do a reduction-in-force rather than a paid ready-to-work program is economic in nature, and as a result, will not be eligible for relief under force majeure. Similarly, it is not sufficient to show that the triggering event simply made maintaining employment or investment levels less profitable. *United Sugars Corp. v. U.S. Sugar Co.*, 2015 WL 1529861 at \*3-4 (D. Minn. April 2, 2015) (finding that the force majeure clause did not apply where governmental action made performance unprofitable but did not prevent or prohibit performance).

The length of time for which [Neb. Rev. Stat. § 77-5727\(9\)](#) prevents recapture will depend on the project-holder’s ability to demonstrate that the triggering event continued to cause its failure to maintain levels.

This position applies to all requests to invoke [Neb. Rev. Stat. § 77-5727\(9\)](#) as a result of the national emergency declared on March 13, 2020.

For the Tax Commissioner

Sincerely,



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