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NEW LAW. New Opportunities.

Changes to Michigan Economic Development Incentives

Many factors go into the decision of whether to invest in a project or sit on the sidelines. From economic conditions to government incentives, one must carefully assess the circumstances in order to make a wise investment. The question is, is now the time to act?

Have you heard that the state of Michigan eliminated its economic development incentive programs?

That's not quite accurate. The state has eliminated state level tax credits that incentivized job creation and redevelopment of brownfield property. However, the state and local governments still have an arsenal of tools in their economic development tool boxes that will likely provide more flexibility for eligible projects.

What is the state of Michigan doing to encourage economic growth and development?

Michigan's legislature has authorized a \$100 million discretionary fund. The fund will focus on incentivizing companies locating or expanding in Michigan and organizations implementing community revitalization projects.

The funds became available October 1, 2011. However, legislation authorizing the new economic development program is still working its way through the Legislature. The Michigan Economic Development Corporation (MEDC) is developing guidelines for the program under the assumption that authorizing legislation will be passed.

How will the program operate?

Rather than providing tax credits, the new program will offer up-front grants, loans and other assistance to qualified businesses. Selection criteria for the grants are likely to be familiar – level of capital investment in the state, economic impact of the project to the community, and jobs, jobs, jobs.

Based on the pending legislation, the program will place priority on providing assistance to companies in order to close a deal and provide financing to second-stage companies that need to obtain bank financing or need to leverage such financing.

The program will also focus on community revitalization projects. Rather than providing incentives specifically for brownfields or historic buildings, a project engaging in community revitalization, whether it redevelops a brownfield or creates a sustainable development in an underserved community, will qualify for the community

revitalization program. Community revitalization projects can receive the lesser of up to \$10 million or 25% of the project's eligible investment. Eligible investment includes costs of demolition, construction, renovation, and site improvements, including the addition of personal property.

What are the program limitations?

New investment and new jobs will likely be required. The MEDC plans to recommend that retention of existing jobs no longer be incentivized.

The proposed legislation currently provides that a company could not receive more than 10% of the total money available for incentives in a given fiscal year. Thus, for the 2011-2012 fiscal year, the maximum amount one project could receive is \$10 million. This limitation may affect the potential for competitive large scale projects.

What tools do local communities have to incentivize a project?

The biggest tool local governments have is the ability to fully or partially abate real and/or personal property taxes for a period of years.

BOTTOM LINE: Like Mark Twain's death, the death of Michigan's economic development incentives is greatly exaggerated. While tax credits have been eliminated, the state is replacing the tax credit program with what it views as a more robust, more transparent, and more business-friendly program of providing up-front grants and loans. For more information, please contact our firm.

Economic Development Incentives

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assisted with this article.



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Duty To **WARN**

>>> Laid-off Employees and the Impact of the Bankruptcy Code



A company that is contemplating filing for protection under Chapter 11 of the Bankruptcy Code is often facing both operational and financial challenges. While an integral part of most corporate restructuring strategies involves cutting staff, companies must be mindful of limiting their liability when laying off employees.

A company that is planning workforce reductions must consider the implications of the Workers Adjustment and Retraining Notification Act (WARN Act), which provides that affected employees are entitled to at least 60 days' notice of a potential termination. When an employer fails to give such a warning, the affected employees are entitled to back pay and benefits for up to 60 days. However, that may not be the case for a company in bankruptcy.



According to court decisions in the *In re Powermate Holding Corp.*, and *In re First Magnus Financial Corporation* bankruptcies, laid-off workers may be denied statutory pay benefits. In these cases, the employers successfully argued that upon entering bankruptcy, employees become general unsecured creditors – entitled to little if any recovery – with respect to their claims for pay benefits resulting from their employer's failure to provide advance notice as required under the WARN Act.

In *Powermate* and *First Magnus*, former employees argued that the portion of the 60-day WARN Act liability period that occurred after the bankruptcy filing

date was an administrative claim – entitled to a higher priority – while the debtor/employer asserted that the claims were general unsecured claims.

This distinction between administrative and general unsecured claims is critically important because administrative claims must be paid in cash in full in order for a plan of reorganization to be confirmed, while unsecured creditors are often paid only a small fraction of the face amount of their claims.

Although the courts' rationales differed, both held that the former employees' claims were mere general unsecured claims. The courts emphasized that if the former employees' interpretation was accepted, a debtor's ability to reorganize would be severely hampered, if not crippled, due to the full payment requirement.

Even though decided within the specific context of the WARN Act, these cases provide a good example of the tension between creditors attempting to elevate the status of their claims and debtors arguing for unsecured treatment with the future of their business on the line. If you'd like to learn more about the WARN Act and/or bankruptcy issues in general, please contact our office.

Bankruptcy
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{ *hello*

DESTINY CALLING?

Don't Be Afraid to Answer the Phone

A quotation from my nine year old son's favorite movie, *Bolt*, has an important message for business owners. While, admittedly, the quote comes from a cartoon hamster named Rhino who is volunteering himself to help a "super dog" named Bolt, in today's economic environment we should all take inspiration where we can get it, right?

{ *Rhino: "Ring, Ring! Who's there? Destiny? I've been expecting your call!"*

Destiny is calling business owners every day in the form of investment bankers and finders hired by private equity funds or business development executives of public companies. These professionals are looking for investment opportunities and often will "cold call" specific companies that a client has targeted to ask if the owner has an interest in a transaction. Oftentimes, business owners never return these calls for fear that it is just a business broker looking for a fee or, if they do engage in discussions, that someone will leak confidential information or spread the word they are looking to sell. Those are valid concerns, but asking two key questions can help a business owner determine if further discussions are worthwhile:



1. What is the name of your business and what is your contact information?
2. Do you get paid a fee if a transaction takes place and who pays the fee?

If the caller works in the business development office for a reputable company, tell him or her that you would like to set up a time to talk later. In the interim, you can check out the person's and/or company's credentials before the next call. You should also consider having a trusted advisor with merger and acquisition experience on the call who can bridge the gap between what is being said

and what is really meant, and an extra set of ears also helps chronicle the conversation.

At this stage, a confidentiality agreement is generally not necessary because you will be mostly listening and asking questions. You should learn why they think your business is a fit and what they know about you already. If you like what you hear, a confidentiality agreement should be signed before having any discussion that discloses material information. The confidentiality agreement should prevent disclosure of a potential transaction and also contain a non-solicitation clause that prevents hiring any of your key employees if a deal is not completed. Even with a signed confidentiality agreement, customer identities, pricing strategies, and trade secrets should not be disclosed until much later in the process.

If the caller is a finder or investment banker, the answer to the second question will certainly be "yes" and you will end up paying their fee either directly or in the form of a lower purchase price for the business. However, investment bankers and finders often can earn every penny by either obtaining a higher value for the business if engaged by the seller or finding opportunities that would not otherwise be known to a buyer. Many are also very skilled in focusing on the important issues that must be resolved in order to complete a deal. If the caller wants to represent you, then most likely there is no "real" buyer interested at that time and he or she is just fishing for an engagement. If the caller is representing a buyer, he or she should be willing to disclose the name of the buyer at the outset. There are landmines in this process, however, so you should consult with an advisor experienced in M&A to help you avoid them.

It is a pretty good time to be a seller right now (or to take on an equity partner if you want to continue to operate your business but you want to "cash out" a portion of your company's value). Federal capital gain rates are still at 15%, strategic acquirers have lots of cash on their balance sheets, financial buyers such as private equity funds are hungry for new deals after spending time on the sidelines during the recession, and banks are funding acquisitions again. Many business owners wonder how they can get started – the first step can be as simple as answering a phone call. Contact our firm if you have any questions.

Corporate
John M. Sommerdyke 616.776.6312



IS THERE TAX ON THE CLOUD?

We've all heard the well publicized debate raging in a number of states over whether to force retailers to collect sales tax for online transactions. A lesser known – but perhaps every bit as important – discussion involves whether to tax another technology innovation, in this case “cloud computing.”

Cloud computing, also called “software as a service,” takes place on virtual servers over the Internet. It has gained credibility as an efficient and viable means of doing business as an increasing number of businesses have moved their IT operations to the cloud.

As companies change the way they do business, politicians and taxing authorities are now grappling with the issue of whether cloud computing should be subject to tax. Specifically, a handful of states, including Michigan, are debating whether companies that sell software and data accessed through the cloud are peddling a taxable good or a nontaxable service. Factors to be considered in determining taxability can include whether a license of software is granted by the agreement, the location of the server, and whether the service or software is being delivered to individuals or businesses resident in a state. Also relevant is whether the service provider has a taxable presence in the state where the customer accesses the application, and whether the customer has a taxable presence where the servers running the application are located.

Depending on the nature of the transaction, the question of whom to tax and for what can be a difficult one. For example, consider a scenario in which a Michigan-based company purchases server space and cloud-based software from a California-based company. Simple

enough, but further consider that the California company has servers in New Jersey and Illinois, and the Michigan company has subsidiaries around the country that utilize the server space. This becomes a much more complex transaction from a tax collection standpoint.



Michigan's General Sales Tax Act and Use Tax Act include within their scope “pre-written computer software.” A group of eight Michigan state senators recently introduced bills (Senate Bills 335 and 336) that would amend these acts to clarify that software as a service, or cloud computing, falls outside the definition of pre-written computer software and is, therefore, not subject to Michigan's 6% sales or use taxes.

The bills were passed by the Senate on June 16, 2011, and are currently pending before the Committee on Tax Policy in the Michigan House of Representatives. The bills would operate retroactively and specify that the right to use pre-written software installed on another person's server is not a taxable transaction. It's too early to know whether these bills will become law. However, anyone engaged in providing cloud computing services as well as consumers of these services should closely monitor what develops.

For more information about legislation or litigation involving technology, intellectual property protection of information technology assets, or any other information technology law issue, please contact the author or Gregory A. Nowak at 313.496.7963.

Information Technology
Kathy Ossian 313.496.7644

SUNNY DAYS *or* GATHERING STORM?

THE ROLE OF FINANCIAL FORECASTING IN ESTATE PLANNING

The most carefully documented estate plan can still fail to accomplish its objectives if it doesn't take into account a person's financial status at important life stages. While it is crucial to forecast one's financial state at retirement, it is equally important at other significant life milestones.

A common modern family dynamic illustrates the need for careful planning and forecasting. Divorce and remarriage often leads individuals to create an estate plan allowing a second spouse to maintain his or her current standard of living – while also benefitting children from a prior marriage. In such a situation, necessary funds must be available to accomplish these objectives. For example, if a person wants their surviving second spouse to be able to continue living in the primary residence and utilize one or more vacation homes, financial forecasting can help ensure that adequate funds will be available to maintain those homes even if other assets are passed directly to the children.

When planning for such situations years in advance, it is necessary to forecast what the future expenses of maintenance will be and whether one's funds will grow adequately to defray those expenses. It is very helpful to prepare a forecast based upon expected income, anticipated cost of living increases, and the surviving spouse's likely lifespan. This, in turn, requires making assumptions about one's own projected lifespan. If the forecast shows that funds will be inadequate, then one must consider reducing the amount that will be passed to the children. In many cases, people have a vague idea of how much will be required at their death to provide for a surviving spouse, but, when confronted with a forecast based upon realistic facts and assumptions, it is often an eye-opening experience that results in changes to their current lifestyle, investment allocation, and/or estate plan.

Gift-giving is also an estate planning strategy that requires financial forecasting. Given the current uncertainty

regarding estate tax exemptions, people are often uncertain about whether to make gifts to children and grandchildren and, if so, in what amounts. The first step in any gifting analysis is always to determine whether current lifestyle can be maintained after reducing one's estate by the amount of the gifts. A financial forecast may also be useful in planning for exceptional circumstances that may arise during one's lifetime, such as medical and educational expenses, weddings, home purchases, and long-term care expenses.



To help clients prepare a forecast, Miller Canfield attorneys have developed a checklist of items to be considered and assumptions that must be made during the process. We also have access to software programs utilizing various asset allocation models in order to forecast where one's estate will be at future dates. This process helps create a forecast that utilizes realistic assumptions about rates of return, tax rates, future events that may impact the assets available and cost of living increases. It forces one to predict and anticipate future events and distinguish between what is important and what is not important. Finally, it can provide a path toward achieving one's objectives. If you believe such financial forecasting would be helpful in achieving your objectives, please give our office a call to schedule a session with an estate planning attorney.

Personal Services
James W. Williams 248.267.3211

SUCCESS OR LIABILITY?

BUYER BEWARE

When buying a business, the purchaser is often focused on looking forward – to new profits, new product lines and new opportunities. But without careful planning, the new company will be looking backward at successor liability issues that can haunt them. This is particularly true in the context of employee obligations.

A business can be bought as either a purchase of the assets or the purchase of the entity's stock (if a corporation). State law provides that, as a general rule, an asset purchaser is not liable for the debts of the seller. Exceptions to this rule focus on whether (1) the buyer has implicitly or explicitly assumed the obligations, (2) the sale is merely a merger or corporate reorganization that leaves real ownership unchanged, (3) there are certain employment and environmental liabilities, or (4) the sale is fraudulent as it relates to creditors.

Federal common law dealing with successor liability is much broader. Federal successor liability has its roots in traditional labor law and generally provides that a buyer will be liable for the seller's labor related debts if: (1) the successor had notice of the claim before the acquisition and (2) there was "substantial continuity" in the operation of the business before and after the sale. In *Equal Employment Opportunity Commission v Vucitec*, the Court of Appeals for the Seventh Circuit wrote that the issue of successor liability is "dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake." In *Vucitec*, the Court of Appeals reversed the lower court's ruling and held that the defendant-asset purchaser was liable as a successor employer. This case highlights the importance of successor liability claims in order to prevent parties from avoiding the costs of their misconduct by selling their assets free of any liabilities and distributing the proceeds to their shareholders.

Without careful planning, successor companies can become liable for ERISA plans, multiemployer pension funds, and retiree medical insurance – among other employee or labor liabilities of the acquired company.

In addition, there are other areas of concern for a successor company. ERISA section 510 makes it "unlawful to... discharge, fine, suspend, expel, discipline, or discriminate against a participant (in a qualified plan) or beneficiary for exercising any right that he is entitled to under the provisions of employee benefit plan." Failure to comply with a section 510 request can lead to civil and criminal penalties.



If a successor employer has more than 50 employees, it is covered by the Family Medical Leave Act (FMLA). FMLA raises successor liability concerns as it specifically defines an employer as including any "successor in interest of the employer." Even in an asset sale, where former employees have COBRA benefits, the successor employer will be responsible for the remaining period of coverage.

What does all this mean?

There is no certainty that a purchaser of assets will be shielded from liability for benefits promised to the seller's employees.

So what is a buyer to do?

Conduct careful due diligence. Analyze and understand the seller's benefit plans. And work with experienced legal counsel to structure a transaction that limits successor liability as much as possible.

Call us if you have questions about successor liability, taxes or employee benefits.

Tax + Employee Benefits
Kal Goren 248.267.3267



A CHANGING LANDSCAPE

China Finalizes Interim Measures for the Participation in Social Insurance of Foreigners Employed in China

Foreign companies with operations in China should be aware of important new regulations that may impact their workforces.

On September 6, 2011, China’s Ministry of Human Resources and Social Security released final “Interim Measures for the Participation in Social Insurance of Foreigners Employed in China” (the Interim Measures). Draft measures had been issued for comment in June. The Interim Measures became effective as of October 15, 2011.

The Interim Measures for the first time require foreign employees legally working in China to participate in China’s social insurance system. Foreign employees in China fall into two categories under the Interim Measures:

- 1** Foreign employees employed by companies, enterprises, public institutions, law firms, accounting firms, and other employers registered in China including wholly foreign owned entities and foreign invested joint ventures.
- 2** Foreign employees working for their foreign parent company in a branch or representative office registered in China.

According to the Interim Measures, foreign employees in both categories are required to participate in China’s basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance, and maternity insurance programs. The employer is responsible for registering the foreign employees for the social insurance programs. The social insurance premiums are to be paid by the employer and the foreign employee on the same basis as current regulations provide for the employer and domestic employees.

The Interim Measures require the employer to register a foreign employee for social insurance within 30 days of issuance of his or her employment certificate. An employer is subject to penalties for failure to timely complete the social insurance registration or for failure to pay the required social insurance premiums.

The Interim Measures exempt foreigners who are nationals of countries that have entered into bilateral or multilateral

treaties with China relating to social insurance. The United States does not have a social insurance treaty with China. To our knowledge, only Germany and South Korea currently have social insurance treaties with China.

The Interim Measures address a number of issues relating to foreign employees participating in China’s social insurance programs including social security cards for employees, retaining individual pension accounts when leaving China before retirement age, cumulating payment periods for foreigners who leave and subsequently reenter employment in China, applying for payment of individual pension accounts in lump sums, treatment of pension balances upon death, requirements applicable to foreigners receiving social insurance benefits outside China, and dispute resolution provisions including mediation, arbitration, and litigation.

The Interim Measures are relatively short and leave many questions unanswered. Additional information may be available in the implementing regulations.

If you have questions or if we can provide assistance, please contact any member of our China Practice Team.

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Firm Adds Talent and Depth to its China Practice

★★ DR. ZHIGUO DU ★★



We are pleased to announce that Dr. Zhiguo Du has joined our China Practice Team in our Troy office. Zhiguo focuses his practice on international business transactions, corporate governance, tax planning, and our China practice. He has extensive experience representing Chinese enterprises doing business in the U.S. and U.S. companies with operations in China.

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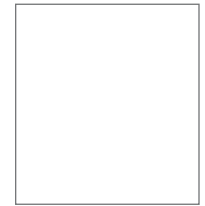
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RETURN SERVICE REQUESTED



MORE POSTERS ON THE WALL

New Posting Requirements for Employers Become Effective January 31, 2012

On August 25, the NLRB issued a new 45-page rule requiring employers to post an 11" x 17" notice. The rule poses new issues for both unionized and non-unionized employers. While originally slated to go into effect on November 14, 2011, the NLRB recently delayed implementation of the posting requirement to January 31, 2012.

In addition to unionized employers, this rule reaches most non-unionized employers. Rare exceptions include employers in the agricultural, railroad and airline industries (which the NLRB does not cover), the postal service, government employers, and certain small businesses over which the NLRB does not exercise jurisdiction. Independent contractors are also excluded.

Employers must post the notice:

- in conspicuous places (including all places where notices to employees concerning personnel rules or policies are customarily posted)
- on the Internet and intranet if the employer customarily posts personnel policies or rules in that manner
- in the format and size (at least 11" x 17") that the rule prescribes
- in English and all other languages spoken by at least 20% of employees (if those employees are not proficient in English) – although the rule offers some options on this point

It should be noted that two lawsuits filed to prevent the posting requirement will be consolidated and heard by a federal judge on December 19, 2011, adding further uncertainty to the finality of the posting requirement.

For more information, contact your Miller Canfield Employment + Labor attorney.



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