

Guide to Help States Adjust Incentive Performance Agreements in Response to the Current Economic Crisis

In the economic crisis brought on by the coronavirus and COVID-19 public health concerns, State economic development executives are considering two significant questions regarding incentives: how to adjust existing incentive agreements to increase flexibility for companies and investors in a fair manner; and how best to use incentive programs to help their states respond to the challenge. Conversations with economic development leaders have highlighted several concerns related to incentive program adjustments for existing agreements.

A coherent set of principles and approaches around adapting incentive use can help states respond strategically rather than on an ad hoc or case-by-case basis. Appropriate changes will differ depending on whether you're considering incentive agreements that must be updated or new opportunities being pursued, and whether those incentives are discretionary or statutory.

Types of Incentives and Agreements	Discretionary	Statutory
Existing Agreements	Focus of this guide ←	
New Opportunities		

This document addresses issues to consider when adjusting the terms of existing incentive agreements for discretionary incentives that have already been provided to companies. Future statements will address statutory incentive programs and options suitable for new opportunities.

Our goals with this document are to (1) help state economic development leaders and staff frame your own state's policies in responding to business relief requests in a fair and consistent manner, and (2) provide your team with a foundation for developing proactive policies to help reduce uncertainty for the businesses with whom you have existing incentive performance agreements.

Principles/Ground Rules

1. We use incentives to achieve our economic development goals. State economic development goals and strategies are different now than when most of our incentive agreements were signed. If we modify incentive agreements in response to current economic and business conditions, these changes should move us toward our new economic development goals.
2. The objective is not to penalize struggling businesses but to work with them so that they and our communities can thrive again. Adjusting the terms of existing incentive agreements can help both government (taxpayers) and business move forward in this difficult time while still protecting the public interest.
3. State and local governments are facing severe revenue shortfalls and do not have the ability to deficit spend. Businesses should understand that state and local governments do not have unlimited funds to help individual businesses, no matter how great the need.

4. Economic development organizations should make clear the rationale and rules for adjusting existing incentive performance agreements, following existing procedures where possible. A well-defined structure for making decisions will help staff, stakeholders, and businesses navigate the process in the near-term and build confidence that public funds are being managed responsibly.

Checklist of Questions to Address in Developing Your State's Guidelines for Marking Incentive Agreement Adjustments

The ground rules can apply to all states, but each state has its own economic priorities and incentive structure that will drive specific policy and program choices. The questions below provide a framework for considering the critical issues and trade-offs that will help economic development leaders assess their options for adjusting existing incentive agreements within their own state contexts in the near-term.

1. What are your economic development goals right now? This is not an easy question to answer. Economic development leaders may want to help every business that needs assistance. They may also want to support business continuity, preserve jobs and wages, address glaring equity problems, and meet other economic challenges. However, resources are limited, and some of these goals will be at odds with the others. What are the top priorities now in your state?
2. When are incentive agreement adjustments appropriate? Discretionary incentive programs are usually targeted and designed to identify project opportunities that are aligned with economic development goals. They are not provided to all businesses.
 - Should the state strive to apply adjustments to all agreements in the same way? Or should adjustments be negotiated individually?
 - Should the adjustments focus on the healthiest businesses, or those that are struggling the most?
 - Should the emphasis be on opportunities where there is still potential for job growth or should the focus be on job preservation?
 - Should agreements with small businesses or major employers take priority?
3. How have state and local stay-at-home and essential business orders affected the ability of incentivized businesses to meet the terms of their existing incentive agreements? In some cases, complying with Governors' stay-at-home orders means that businesses are not able to comply with terms or meet performance targets in existing incentive agreements. Furthermore, as they come back online after the stay-at-home orders are lifted, worker and customer safety issues should remain paramount over short-term concerns about whether the company can meet performance targets in the signed agreement. How should these external restrictions designed to address broader public safety concerns be balanced with the desire for companies meet the spirit and intent of the promised performance requirements included in their incentive agreements?

4. What type of agreement adjustment options are already allowed under current incentive statutes, program guidelines, and contract terms? Most states have the flexibility to amend or renegotiate incentive agreements. Often, they do that on a case-by-case basis. In normal economic times, this may make sense, but perhaps a more systemic approach is in order given the current economic environment.
- What options are available that do not require statutory changes?
 - Which require a formal renegotiation or approval, and which can be implemented administratively?
 - What reporting and oversight requirements accompany each adjustment option?
 - What flexibility is available to invoke across the board waivers or deferments that would allow states to reduce the amount of staff time required to work with individual incentive recipients and reduce the uncertainty for businesses that result from delays that might result if the state is re-negotiating with many firms at the same time?

Implementation Options

The actions states are taking to modify existing incentive agreements fall into three main categories:

- timing adjustments,
- performance adjustments, and
- penalty adjustments.

These approaches are consistent with other federal and state government actions to assist businesses by extending deadlines and waiving penalties related to taxes, inspections, permits, licenses, contracting terms, and regulatory compliance reporting.

Timing adjustments

States report that many incentive programs allow some flexibility around the timing for receiving mandatory compliance reports. Performance-based incentive programs are also likely to have procedures in place that allow for amendments to the schedule for companies to achieve their contractual milestones and receive associated incentive payments.

Incentive program managers need to review program statutes, guidelines, and/or contract language to determine the specific options available to them to make timing changes to incentive agreements. It is best to follow existing procedures to the extent possible to provide a structure to the decisions in order to reduce uncertainty for both economic development staff and businesses involved in these decisions and to sustain confidence in the incentives process.

[Maine's Department of Economic & Community Development](#) extended report filing deadlines for its Pine Tree Development Zone and Employment Tax Increment Financing programs, along with the option for individual companies to extend the reporting deadline further if needed. Similarly, the [Illinois Department of Commerce and Economic Opportunity](#) extended the deadlines for companies receiving economic development assistance to submit their Corporate Accountability reports on employment commitments.

SEDE network members are considering options to adjust deadlines for performance agreement milestones with both near-term and long-term objectives in mind. For example, Rhode Island is using its existing statutory authority to adjust the time frame for compliance for individual incentivized projects. Georgia is taking a similar approach but is relying on existing force majeure language in contracts to determine when extensions will be needed. Maryland's Department of Commerce is considering how to use its existing ability to renegotiate incentive packages to provide additional time to reach milestones, while also looking beyond immediate compliance challenges to offer more holistic economic development support to companies to help businesses survive and keep projects viable.

States reported that some legislative restrictions, such as reporting period dates or maximum investment terms, potentially limit the ability of some agencies to provide these kinds of deadline adjustments.

Performance adjustments

Discretionary incentive programs may also include provisions for contract amendments that address performance requirements, such as the number of new jobs to be created, typically accompanied by a reduction in the incentive total or a clawback mechanism, depending on how the incentive is structured. Over the past decade, more states have moved to pay-for-performance contracts rather than clawback provisions because the latter can be difficult to enforce, especially in times of economic distress.

In Delaware, companies that are falling behind on their performance commitments can submit a cure report with the Delaware Economic Development Authority in which the business must explain steps it will take to get back on track. The [Michigan Business Development Program](#), a discretionary grant incentive, has well-defined amendment procedures for its agreements. The Michigan Economic Development Corporation also [reports on amendments](#) in its annual legislative reports and provides figures on original contractual jobs, [revised contractual jobs](#) (following amendments), and actual jobs created, a good practice when amendments occur. For companies that will not meet the full terms of its agreement but have made some progress, Arizona will provide credit for milestones achieved while halting the remainder of the contract, if necessary.

New Jersey has recognized that the terms of some of its incentive agreements conflict with current stay-at-home orders issued by the Governor. The state has [modified requirements](#) for its Grow NJ and Urban Transit Hubs so that companies may exclude months during which the order has been in effect from their reporting on the number of workers employed each month, if the business can demonstrate that their employees were prevented from working at the qualified facility and there were no viable work at home options. In addition, the state may recalculate the amount of the business award, resulting in a possible reduction of the annual tax credit allocation.

Penalty adjustments

Fee and penalty waivers are other options some states are implementing. [The Nebraska Department of Revenue](#) will not require taxpayers receiving incentive tax benefits to repay those benefits if they do not meet or maintain required employment or investment levels due to the novel coronavirus, if they provide supporting evidence. The [New Jersey Economic Development Authority](#) is providing for payment moratoria on loans, allowing loan-maturity extensions, and late fee and loan modification request fee waivers for its existing portfolio companies.