PITFALLS TO AVOID WITH RETIREMENT PLANS IN M&A DEALS

Tax Law Section

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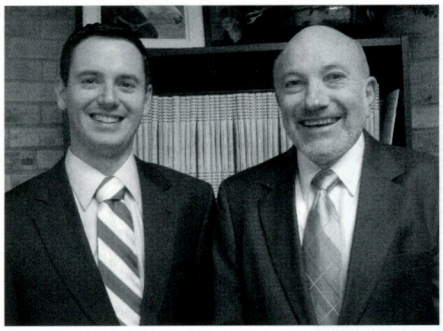

In merger and acquisition ("M&A") transactions, a seller's retirement plan can create unintended liability for a buyer. To avoid such liability, the buyer should (i) perform its due diligence with respect to the retirement plan carefully, and (ii) address issues with the seller early in the M&A transaction process. By identifying the issues and considering the options well before the transaction occurs, the buyer can minimize risk and prevent "gotchas" from arising after the deal closes.

The buyer should investigate carefully the seller's retirement plan as part of its due diligence investigation. For example, the due diligence request list should include, among other things, a request for (i) copies of the seller's retirement plans (including pension plans and 401(k) plans) and any amendments; (ii) summary plan descriptions; (iii) copies of any favorable determination letters issued by the IRS; (iv) actuarial reports and trust agreements; (v) correspondence with respect to the tax qualification of such plans; (vi) year-end compliance testing results; and (vii) copies of IRS Form 5500s filed in recent years. Through its due diligence investigation, the buyer can determine if there are facts that require special consideration with specific representations and warranties, covenants, or both in the acquisition agreement.

Where the buyer intends to acquire the seller's business through a stock sale or a merger, there are additional issues that may need to be addressed. The buyer will generally assume the liabilities of the seller in stock sales and mergers. Therefore, the buyer needs to consider how the seller's plan should be handled. The options may include taking on the seller's plan and operating it as a stand-alone plan, merging the seller's plan into the buyer's existing plan, terminating the seller's plan, or leaving the seller's plan with the seller (where possible). Each of these options raises additional questions that must be considered by the buyer when analyzing its options.

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Generally, the buyer in an asset sale has some comfort that it is not assuming any retirement plan liabilities of the seller unless the acquisition agreement provides otherwise. An exception to this general rule, however, may arise if the seller contributes to a multiemployer plan. Multiemployer plans cover collectively bargained employees of more than one employer (typically members of the same union). Under certain factual circumstances, the buyer may be deemed to be a successor of the seller and will be found to be responsible for funding liabilities related to multiemployer plans. To minimize this potential risk, the buyer may propose alternatives to the seller to address its concerns, like a holdback of a portion of the sales proceeds to provide comfort to the buyer.

The foregoing is a basic overview of a few selected matters that buyers need to consider in this area, and it is not intended to be a comprehensive review. Buyers in M&A deals should consult with an employee benefits specialist when the facts warrant specialized knowledge of an issue.

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