

April 10, 2013

8:00 AM - 9:00 AM PST 4/9/2013

1 hour CLE



Employee Benefit Plans in  
Mergers and Acquisitions  
Jeff Belfiglio  
jeffbelfiglio@dwt.com

---

---

---

---


---

---

---

---

### Importance of Benefits Issues



- May include significant liabilities
- Can even shape form of the transaction
- Opportunity to clean up seller plans, consider benefits needed going forward
- Involve benefits professionals early
  - HR, attorney, actuary
  - Involves more than "the reps"
  - At letter of intent stage, avoid taking on unfunded liabilities without reserving adjustment to price

---

---

---

---


---

---

---

---

### Our Approach Today



- Can look at type of transaction, type of plan
- **Diligence**
  - Understanding Seller's plans and potential liabilities
- **Disclosure**
  - Detecting hidden or contingent liabilities
- **Disposition**
  - Determining benefits structure after closing

---

---

---

---

---

---

---

---

**Diligence**

- Generally buyer assumes liabilities in stock or merger deal, not in asset deal, but:
  - May be able to terminate plans before closing
  - Can expressly assume plans in asset transaction
  - Potential "successor liability" for some multiemployer and COBRA issues
- Various document checklists available
- Liability for Controlled Group
  - Regardless of seller's plans
  - Mainly DB and multiemployer obligations
  - Note private equity portfolio issue

---

---

---

---

---

---

---

---

**Diligence, cont.**

- Single employer defined benefit plans
  - PPA funding rules and benefit restrictions
  - Liabilities for financials determined differently
  - Need projections for funding as ongoing plan and termination
  - Reportable events (new proposed regs)
  - Qualification issues (see below)

---

---

---

---

---

---

---

---

**Diligence, cont.**

- Defined Contribution Plans
  - Qualification Issues (also apply to DB plans)
    - Determination or approval letter not enough, also timely interim amendments
    - Operational issues, coverage and discrimination testing
  - Timely deposit of 401(k) contributions
  - Reporting and disclosure requirements
  - Loans can be a challenge, require changes to seller and buyer plans

---

---

---

---

---

---

---

---

**Diligence, cont.**

- Multiemployer Plans
  - Critical or endangered plans require increased contributions; may not be reflected in CBA yet
  - Withdrawal liability a touchy issue
    - Obtain estimate, but other limits may apply
    - Stock deal does not trigger, asset deal often will
    - 4204 "sale of assets" exception requires careful drafting, may escape all liability after five years
    - Buyer takes on obligations, can limit potential future liability by indemnification
    - Pros and cons for seller and buyer, likelihood of withdrawal within 5 years

---

---

---

---

---

---

---

---

**Diligence, cont.**

- Severance plans, employment agreements
  - Severance or change of control may trigger or increase payment, but may be able to amend
- Deferred compensation plans
  - Broad scope could include LTIPs, severance
  - 409A compliance, amended by 2008
  - Severance or change of control may trigger payment
  - Can elect termination treatment in asset sale
- Stock Plans
  - Transaction may trigger vesting, exercise
  - 409A rules if converted to buyer stock

---

---

---

---

---

---

---

---

**Diligence, cont.**

- Welfare Plans
  - Retiree medical unusual now, but may have grandfathered employees or side deals. Difficult to measure and divide liability. May be able to eliminate.
  - Documentation, reporting issues, "Wrap plan" may be needed
  - HIPAA and COBRA compliance
  - Health Care Reform compliance
- COBRA
  - Who's responsible? When is buyer on the hook? Negotiating cost sharing.
  - Contractual allocation may not be practical

---

---

---

---

---

---

---

---

**Disclosure**

- Representations and Schedules
  - Schedules may not match diligence requests
- Ideally will reveal liabilities and defects not apparent from documents
- Correction may follow
  - Late amender filing
  - Operational errors—have seller fix or use VCP
  - Late deposits—DOL tightening up use of DFVC and "calculator." Don't forget excise tax.

---

---

---

---

---

---

---

---

**Disclosure**

- "Usual" reps (subject to schedules) include:
- List of all plans (broadly defined), no other plans
- Delivery of copies of all plan documents, SPDs, trust agreements, insurance policies, administrative contracts, recent 5500s, nondiscrimination tests, actuarial reports, government correspondence
- All applicable 5500s and "top hat" notices filed on time (now often available online from DOL)
- All plans in [material] compliance with Code, ERISA, other applicable law, and their own terms
- All 401(a) plans and trusts are qualified, have a determination letter, nothing has occurred to cause disqualification

---

---

---

---

---

---

---

---

**Disclosure, cont.**

- No prohibited transactions, nothing that would subject plan to excise tax
- No violations of fiduciary duty, no pending DOL or IRS audits or litigation. No VCP, DFVC, or VFPC filings
- All contributions deposited in timely manner, all insurance premiums current through closing
- Plans do not hold any employer stock or property
- Transaction will not cause accelerated vesting, severance payment, or increase in benefits. No amendments to increase benefits. Transaction will not result in any golden parachute payments.

---

---

---

---

---

---

---

---

**Disclosure, cont.**



- Seller nor affiliated employer has ever participated in a defined benefit plan (Title IV plan), OR
  - The plan is fully funded (benefit liabilities do not exceed assets)
  - There have been no reportable events
  - No funding waiver has ever been requested
  - No such plan has terminated in last five years
  - All PBGC premiums paid
  - Seller does not have any liability for minimum funding for affiliated employer plan

---

---

---

---

---

---

---

---

**Disclosure, cont.**



- Seller nor affiliated employer has ever contributed to any multiemployer plan, OR
  - No complete or partial withdrawal has occurred in the last five years
  - No such plan is in critical or endangered status
  - Seller would incur no withdrawal liability currently
- Other than COBRA obligations, no post-termination welfare plan coverage
- Seller has complied with COBRA notice and coverage requirements
- Any plan can be terminated prior to or after closing

---

---

---

---

---

---

---

---

**Disposition**



- Variety of options in asset sales:
  - Assume seller plans, keep in place for separate workforce. Possible price adjustments for unfunded liabilities.
  - Cover in buyer plans (often with service and deductible credit, no waiting)
  - Terminate seller plans
    - Notice rules for DB plans
    - Note timing issue for 401(k) plans
    - 409A rules for terminating deferred compensation plans
    - Rollovers
- Practical considerations: continuity v. integration, timing issues, coverage issues after transition period

---

---

---

---

---

---

---

---

**Disposition, cont.**

- Point is to cover it in agreement
  - Lay out treatment of plans and employees, any service credit or accelerated vesting
  - Assign responsibility for open and final year funding and reporting
  - Confirm COBRA responsibilities
  - Indemnity for pre-closing defects
  - Will seller executives get new contracts or will existing contracts be assumed?

---

---

---

---

---

---

---

---