

QUALIFIED RETIREMENT PLAN CONSIDERATIONS IN MERGERS AND ACQUISITIONS

(Watch Out for the Baggage)

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Almost Every Retirement Plan Has Some Baggage

- Both Buyers and Sellers should be aware of it in any merger or acquisition
- Each side to the transaction will have its own perspective



Depending on the Structure of the Transaction, Each Side Will Deal with the Baggage Differently



- Stock Entity Purchase
- Merger
- Acquisition of Assets

What is Needed at Minimum in the Due Diligence Process

- Plan Documents and Amendments
- 5500s for the Last 3 Years
- Audit Reports (if required) for the Last 3 Years
- Actuarial Reports for the Last 3 Years (if a DB Plan)

What is Needed at Minimum in the Due Diligence Process

- Year-End Valuations for the Last 3 Years (if a DC Plan)
- Summary Plan Description and Summaries of Material Modifications
- The Last IRS Determination Letter (if one was obtained)
- VCP Applications and Compliance Statements
- Any IRS or DOL Audit Reports and Closing Agreements with the IRS

Are Representations and Warranties Legal Gobbledygook or Do They Really Mean Something?

- Can a Seller Ever Make Representations About a Retirement Plan?
- Can a Buyer Ever Assume or Take Over a Retirement Plan Without Them?

Danger Signs for a Buyer

- Understaffing of Good Benefits Personnel or the Reluctance to Use Advisors
- Unsophisticated or Overwhelmed Outside Advisors
- Lack of Historical Data, Records or Documents
- Pending or Prior VCP Filings or IRS Closing Agreements

“Big Ticket” Items a Buyer Should Look for

- Improper Characterization of Workers as Independent Contractors
- The Failure to File Returns or Complete Audits (if required)
- Failure to Keep Plan Documents Up-to-Date
- Operational Problems Such as:

“Big Ticket” Items a Buyer Should Look for

- Excluding Eligible Employees
- The Failure to Follow the Plan’s Definition of Compensation
- The Failure to Timely Deposit 401(k) Deferrals
- Improper Hardship Distributions
- The Failure to Make Required Minimum Distributions

Case Study No. 1

Withdrawal Liability Baggage



Case Study No. 2

Partial Plan Termination Baggage



Case Study No. 3

Defined Benefit Plan Funding Baggage



Case Study No. 4

Inheriting Someone Else's
Baggage

