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Thank you for joining us!



Benefits Overview for Mergers & Acquisitions (M&A)

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*Presented by the Regulatory and
Legislative Strategy Group*

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Introduction to M&As



Types of Transactions – Stock Sale

STOCK SALE – COBRA DEFINITION:

A **stock sale** is a transfer of stock in a corporation that causes the corporation to become a different employer or a member of a different employer. (26 CFR § 54.4980B-9)

GENERALLY, INCLUDES:

Arrangement in which one party (the buyer) acquires the stock or other ownership interest in another party's (the seller's) business.

- ➔ Buyer acquires entire legal entity through purchase of shareholders' stock
- ➔ Includes ownership rights and liabilities of seller's business
- ➔ Employment relationship remains intact - no termination as direct result of stock sale



Types of Transactions – Asset Sale

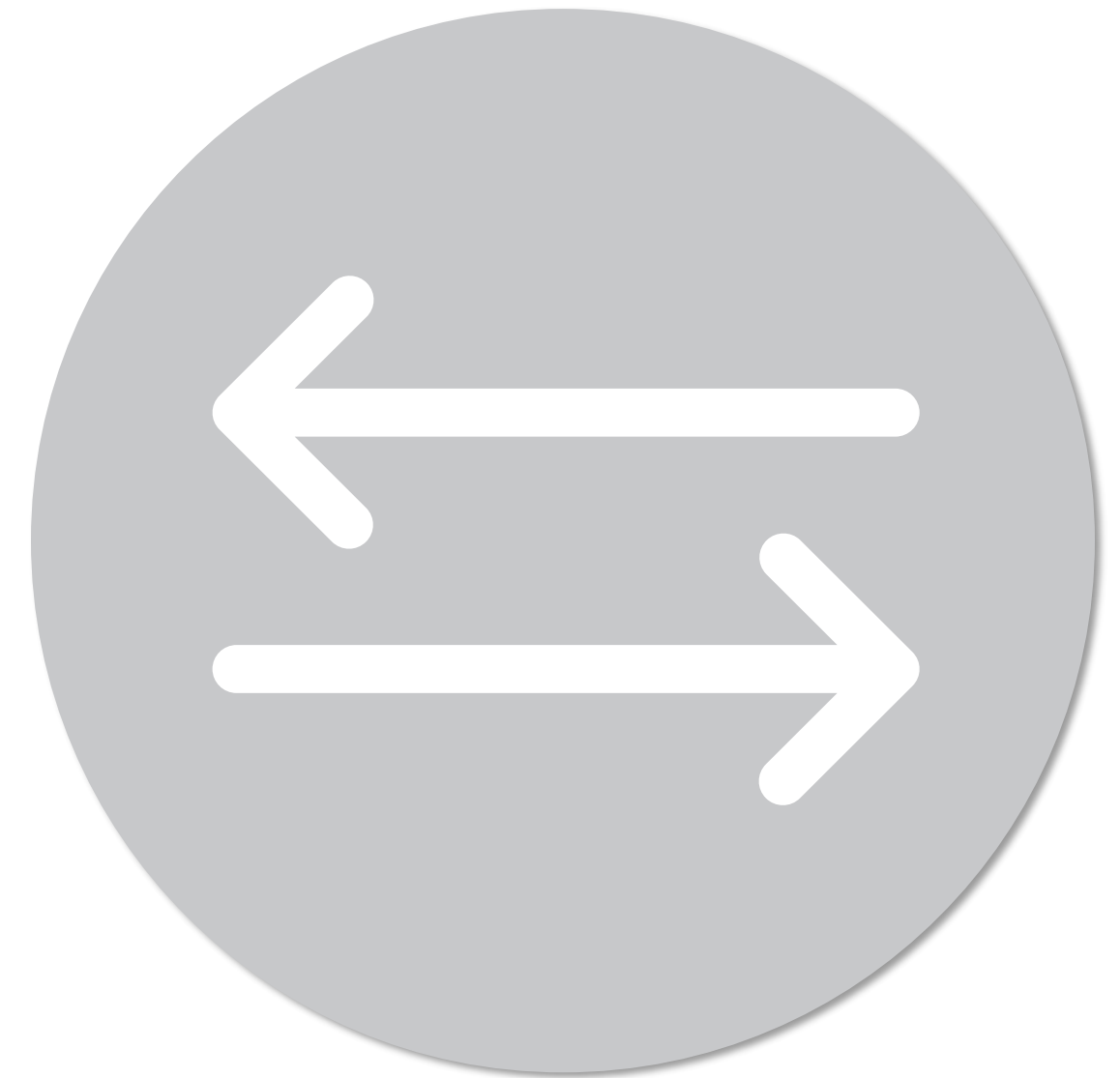
ASSET SALE – COBRA DEFINITION:

An **asset sale** is a transfer of substantial assets, such as a plant or division or substantially all the assets of a trade or business. (26 CFR § 54.4980B-9)

GENERALLY, INCLUDES:

Arrangement in which one party (the buyer) purchases all or specified assets of another party's (the seller) business.

- ➔ May involve purchasing only a portion of the seller's assets
- ➔ Purchase includes only assets and liabilities that are agreed upon
- ➔ Selling company often continues to exist following sale
- ➔ Buyer may choose to retain some or all of seller's employees



Types of Transactions – Merger

DEFINITION:

Consolidation of one corporation into another resulting in a new business entity.

GENERALLY, INCLUDES:

- New business inherits all rights and responsibilities (assets and liabilities) of each of the merged businesses
- Often includes reorganization with new ownership and management
- Can result in terminations of employees



Types of Transactions – Spinoff

DEFINITION:

The distribution by a business to its stockholders of particular assets and especially of stock of another company... with the new company created by such a distribution. (*Source: Merriam-Webster*)

GENERALLY, INCLUDES:

- Stock or asset transaction involving two or more divisions of a larger parent company
- Smaller business operation segregated from assets of previous ownership resulting in the creation of a new company
- Usually results in new management and can include employee terminations



Planning and Due Diligence



Due Diligence

DEFINITION:

“Research and analysis of a company or organization done in preparation for a business transaction (such as a corporate merger or purchase of securities).” (*Source: Merriam-Webster*)

EXAMPLES:

- Financial
- Technology/Intellectual Property
- Legal
- Employee/Management
- **Employee health and welfare benefit plans**

WHY IT'S IMPORTANT:

Manage risk and help ensure compliance with a broad spectrum of plan administration and compliance concerns.

Planning for M&As – General Transaction Questions

- What type of transaction?
 - » Stock, asset, merger, spinoff, etc.?
- What types of businesses are involved?
 - » Sole proprietorship, partnership, LLC, S corp. vs. C corp., etc.
- Will a controlled group exist?
- Will seller continue to exist after the transaction?
- How many employees will there be?

The answers to these questions will impact the administration of the business's employee benefit plans.

COBRA and M&As



COBRA Considerations

PRIMARY ISSUE:

Who has the obligation to offer COBRA continuation coverage following a merger or acquisition?

FACTORS TO CONSIDER:

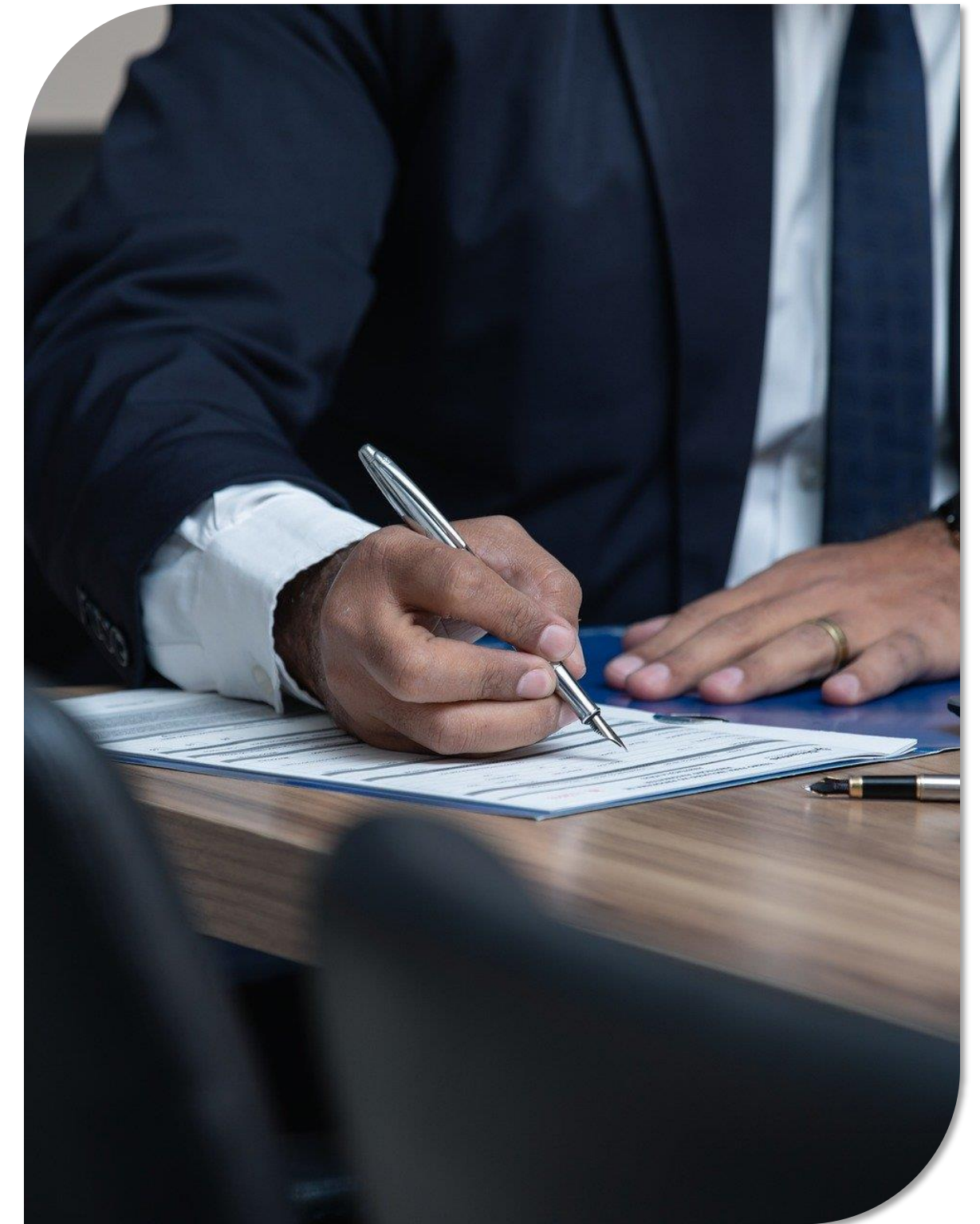
- Is it an asset sale vs. stock sale?
- Will the selling group maintain a group health plan after the sale?
- Is there a COBRA triggering event (qualifying event) resulting in “M&A qualified beneficiaries?”

Obligation to Offer COBRA

BOTH ASSET AND STOCK SALES:

“so long as the **selling group maintains a group health plan after the sale**, a group health plan maintained by the selling group has the obligation to make COBRA continuation coverage available to M&A qualified beneficiaries with respect to that sale.” (Treas. Reg. §54.4980B-9, Q/A-8)

**Buyer and seller permitted to contract
COBRA responsibilities differently.**



Stock Sale - COBRA Considerations

BUYER'S OBLIGATION TO PROVIDE COBRA:

“If the selling group ceases to provide any group health plan to any employee in connection with the sale, a group health plan maintained by the buying group has the obligation to make COBRA continuation coverage available to M&A qualified beneficiaries with respect to that stock sale.” (Treas. Reg. §54.4980B-9, Q/A-8)

BUYER OBLIGATIONS TO OFFER COBRA BEGIN ON THE LATER OF—

- The date the selling group ceases to provide any group health plan to any employee; or
- The date of the stock sale

**Buyer not obligated to make COBRA available to qualified beneficiaries of the selling group who are not M&A qualified beneficiaries.
(Treas. Reg. §54.4980B-9, Q/A-8)**

Asset Sale - COBRA Considerations

SUCCESSOR EMPLOYER:

“If the selling group ceases to provide any group health plan to any employee in connection with the sale and if the **buying group continues the business operations associated with the assets purchased from the selling group without interruption or substantial change**, then the buying group is a successor employer to the selling group in connection with that asset sale.” (Treas. Reg. §54.4980B-9, Q/A-8)

If the buyer is the successor employer, the buyer has obligation to offer COBRA to M&A qualified beneficiaries with respect to that asset sale. (Treas. Reg. §54.4980B-9, Q/A-8)

- Date of obligation same as stock sale
- No obligation to non-M&A qualified beneficiaries (Treas. Reg. §54.4980B-9, Q/A-8)

COBRA Considerations – M&A Qualified Beneficiary

STOCK SALE:

“An individual is an M&A qualified beneficiary if the individual is a qualified beneficiary whose **qualifying event occurred prior to or in connection with the sale** and who is, or whose qualifying event occurred in connection with, a covered employee whose last employment prior to the qualifying event was **with the acquired organization.**”

ASSET SALE:

“An individual is an M&A qualified beneficiary if the individual is a qualified beneficiary whose **qualifying event occurred prior to or in connection with the sale** and who is, or whose qualifying event occurred in connection with, a covered employee whose last employment prior to the qualifying event **was associated with the assets being sold.**” (Treas. Reg. §54.4980B-9, Q/A-4)



M&A Qualified Beneficiaries =

- Qualified beneficiaries already receiving COBRA before the sale occurred
- Qualified beneficiaries who experience qualifying event in connection with the sale

Can be covered employee or covered employee's spouse, dependent child

COBRA Considerations – Triggering Events

WHAT IS NOT A COBRA QUALIFYING EVENT?

Stock Sale

- If employee continues employment with acquired corporation after sale regardless of whether they are provided with group health coverage after the sale. (Treas. Reg. §54.4980B-9, Q/A-5)
 - » No termination of employment in connection with sale

Asset Sale

- Buyer is successor employer and employees continue employment with buyer immediately after sale
 - Covered employee does not lose coverage under group health plan of selling group
- (Treas. Reg. §54.4980B-9, Q/A-6)

ACA and the Employer Mandate



ACA and the Employer Mandate

M&A CONSIDERATIONS UNDER THE EMPLOYER MANDATE:

- Applicable Large Employer (ALE) status after a sale
 - » Timing of status change
 - » Controlled group status
- Offers of coverage to acquired full-time employees
 - » Measurement methods for identifying full-time employees



Controlled Group Status

DEFINITIONS:

Parent-Subsidiary:

- Exists when one or more chains of corporations are connected through stock ownership with a common parent corporation; and
 - » 80% of the stock of each corporation, (except the common parent) is owned by one or more corporations in the group; and
 - » Parent Corporation must own 80% of at least one other corporation. (Sections 1563(a) and 414(b) and (c))

Brother-Sister Group:

- Group of two or more corporations, in which five or fewer common owners (a common owner must be an individual, a trust or an estate) owns directly or indirectly a controlling interest of each group and have “effective control”

ACA IMPLICATIONS:

(Sections 1563(a) and 414(b) and (c))

ALE Status

- Companies with a common owner are generally combined and treated as a single employer for determining ALE status
 - » Each employer within the group is subject to the employer shared responsibility provisions, even if separately they would not be

ALE Information Reporting (1094/1095-C)

- Requirements apply separately to each controlled group member (referred to as an aggregated ALE group)

Employer Mandate – ALE Status

PRIOR TO THE SALE, WERE BOTH BUYER AND SELLER ALES SUBJECT TO THE EMPLOYER SHARED RESPONSIBILITY REQUIREMENT?

- Based on 50 full-time and equivalent employees in the preceding calendar year
- Controlled group rules will apply

TIMING CONSIDERATIONS:

- If both parties already ALEs – no change in status
- Acquisition of a non-ALE
 - » If aggregated ALE group acquires non-ALE, when does the acquired non-ALE become an ALE?
- Merger of non-ALEs
 - » If merger results in 50 or more full-time employees, when does corporation become an ALE?



**Employers
should consult
with qualified
legal counsel
for guidance.**

Employer Mandate – Offers of Coverage

NON-ALES:

- Merger or acquisition may result in new obligation to offer coverage if transaction results in new ALE status

FULL-TIME EMPLOYEES:

- How did parties define full-time employees prior to the transaction?
- Asset Sale
 - » New full-time employees treated as new hires
 - » Subject to a new waiting period (option to waive)
- Stock Sale
 - » New full-time employees likely require an immediate offer of coverage when purchased company is an ALE

Employer Mandate

REPORTING OFFERS OF COVERAGE

- Which entity is responsible for reporting offers of coverage for months prior to the transaction
- Controlled group reporting

HANDLING DIFFERENT MEASUREMENT METHODS FOR VARIABLE HOUR AND PART-TIME EMPLOYEES

- One employer uses the look-back method and the other uses the monthly method
 - » Stock sale – Employees continuing employment with the acquired company likely will continue to use that organization's measurement method
- Both use look-back method but have different lengths of measurement or stability periods

ERISA Considerations



ERISA Considerations

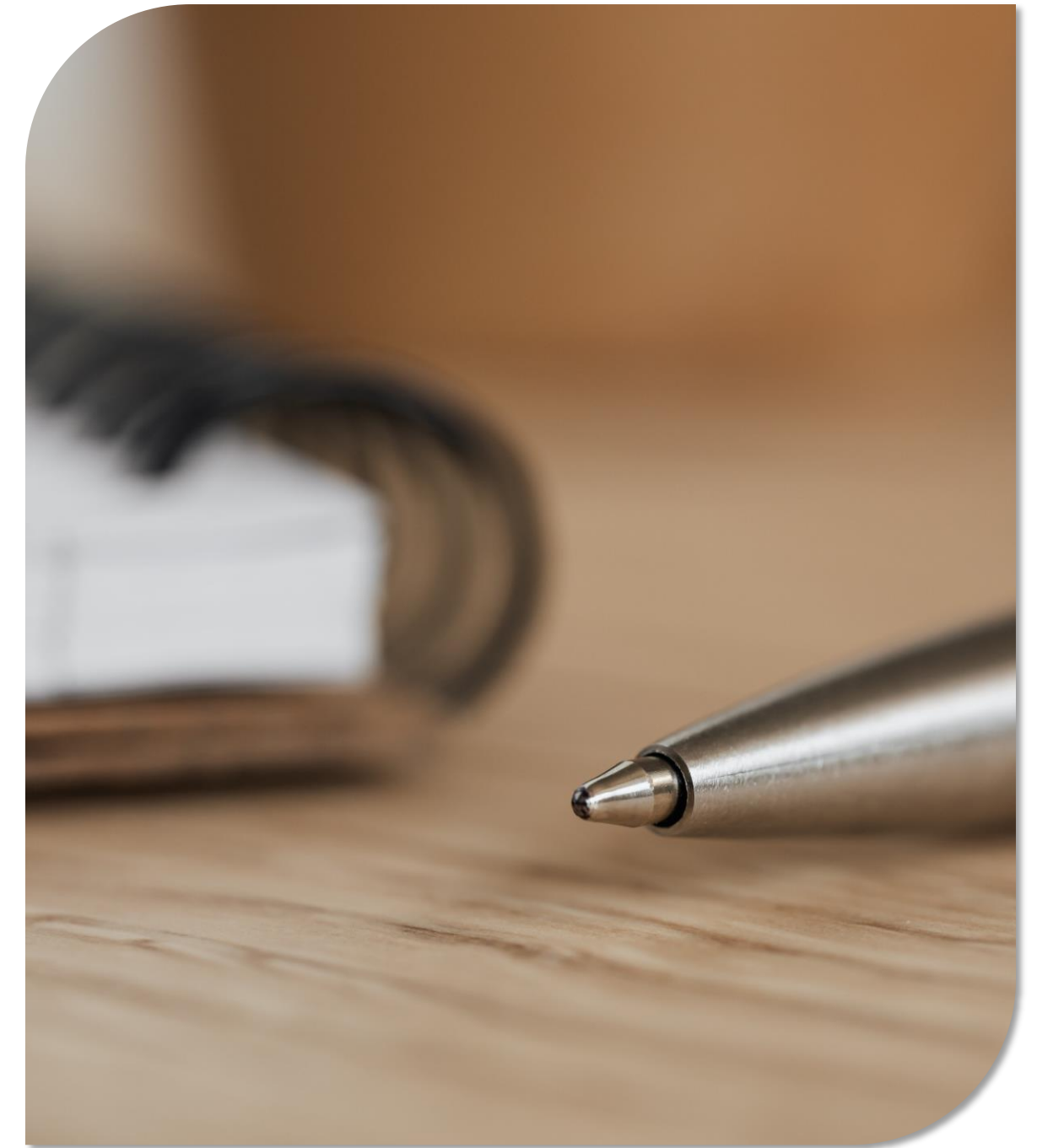
PRE-TRANSACTION CONTRACTS

- What ERISA employee welfare plans are provided by the company being acquired? Fully insured or self-insured?
- Will M&A employees continue to be provided benefits under pre-transaction contracts assumed by the buyer?
 - » **Asset Sale** – If existing plans of the seller are being retained, will they require rewriting or renegotiation?
 - » **Stock Sale** – Will plans need to be amended to reflect the appropriate plan sponsor?
- Will new benefit plans be established to mirror the predecessor or new employer's benefits as closely as possible?
 - » Or will the separate plans be merged into a consolidated benefit offering immediately on closing?

ERISA Considerations

PLAN DOCUMENTS AND AMENDMENTS

- If new employees are not eligible for existing plans, is this clearly stated within the plan language?
- Do plans reflect requirements for employees terminated and rehired by buyer:
 - » New eligibility waiting periods or waiver of requirements
- New eligibility requirements based on new employee population
 - » Location, salary vs. hourly, part-time vs. full-time, etc.



ERISA Considerations

BENEFIT INTEGRATION

- If benefits are to be integrated, amendments providing for adoption of the purchasing entity's benefits by the new or acquired entity may be required
- Will credit be given for deductible/out-of-pocket limits satisfied prior to integration?
 - » Must be negotiated, and arrangements made with incumbent to provide necessary reporting
- Did either entity maintain an HDHP with HSA?
 - » Consider potential impact of other non-HDHP coverage (other than permitted coverage) on HSA contributions

Section 125 Cafeteria Plans



M&A and §125



CAFETERIA PLAN IMPLICATIONS

- Does either entity, or do both entities, maintain a cafeteria plan, including health care or dependent care flexible spending arrangements?
 - » Do they have different plan years?
- Will two pre-tax plans be maintained going forward?
 - » More common in stock sales
 - » Often the seller's §125 plan is terminated

M&A and §125 – Asset Sale

HOW WILL THE SELLER'S CAFETERIA PLAN BE HANDLED?

- Asset sale where employees terminate employment with seller
 - » Employees offered participation in buyer's existing cafeteria plan
 - » Adoption of mirrored version of seller's cafeteria plan
 - » Buyer assumes sponsorship of existing cafeteria plans where acquired business maintains its own plans

CAFETERIA PLAN ELECTIONS

- New elections for employees of acquired business when seller's cafeteria plan closes following transaction
- If buyer assumes sponsorship of seller's plan, would elections continue?

M&A and §125 – Stock Sale

HOW WILL THE SELLER'S CAFETERIA PLAN BE HANDLED?

- Plan can continue without interruption since employees continue employment with same employer
 - » Bound by irrevocable election rule
- Buyer terminates seller's existing cafeteria plan and enrolls employees in buyer's cafeteria plan
 - » Regulations not clear on whether new elections are permitted



M&A and §125

HOW WILL FSA AND DCAP BALANCES BE HANDLED?

- Will buyer assume existing FSA plans and continue to operate them for M&A employees through the end of the current plan year?
 - » Different plan years – Make new elections for short coverage period or hold new employees off from making new elections until the start of the new plan year
 - » If carryover or grace period provisions are desired, arrangements with new and old TPAs must be made for claim payment during the applicable grace or carryover period, as well as run-out
- Termination of seller's plan
 - » Remaining account balances forfeited by participants
 - » M&A employees will need to make new elections for the remainder of the new employer's cafeteria plan year
 - » Will there be a claims submission(run-out) period following plan termination to allow participants to submit expenses incurred prior to closing?
 - » Who will administer the plan?

M&A and Nondiscrimination

WILL CHANGES IN EMPLOYER WORKFORCE AFTER TRANSACTION IMPACT THE IRC NONDISCRIMINATION RULES?

Newly acquired employees must be included when buyer performs nondiscrimination testing when:

- Buyer owns 80% or more of acquired business following stock sale, or
- If the transaction was an asset sale

Transition relief for qualified retirement plans:

- After a change in controlled group status as a result of an acquisition, plans may continue to satisfy Code §410(b) eligibility requirements if requirements were satisfied immediately prior to change and there is no significant change in the plan coverage (Code §410(b)(6)(C))
- **Unclear whether these rules apply to cafeteria plans**

Summary

- M&A situations are complex and involve many moving parts
- Obligations and requirements will depend on specific facts and circumstances
- Other laws to consider:
 - » Family and Medical Leave Act (FMLA)
 - » Workers' Compensation
 - » State and local laws
 - Paid leave
 - Health care mandates
 - Wage & hour laws



Employers will need to work with legal counsel prior to, during and after M&A transaction.

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