

## BUSINESS MERGERS & ACQUISITIONS AFFECT TAX QUALIFIED RETIREMENT PLANS

Business acquisitions and dispositions are an established part of American business. These relatively common transactions involve a number of considerations for the two parties acquiring or selling all or part of a business. One fairly significant consideration has to do with employee retirement plans to the extent that the buyer, the seller, or both sponsor tax qualified retirement plans. As discussed below, it is important to examine the provisions of any plan in effect and to determine the buyer's intention as to what retirement plan or plans (if any) will be offered to the seller's employees after the acquisition is completed. Depending upon the facts and circumstances, it may be important for the seller to take action with respect to their retirement plan *before* the business transaction is consummated.

### Asset vs. Stock Sales

The two common types of acquisition for a corporation consist of either an *asset sale* or a *stock sale*. Partnerships and other types of business entities also engage in asset sales, but since there is usually no stock available, the acquiring business will most likely use other means to become the owners of the business entity being purchased. An *asset sale* consists of the buyer agreeing to purchase all or a specified portion of the seller's assets, including employing related employees. A *stock sale* consists of the buyer purchasing all of the corporate stock, thus replacing the prior owners as owners of the corporation. The type of transaction selected by the buyer and seller

has different results with respect to employee retirement plans.

According to the IRS, an *asset sale* without continuing the seller's retirement plan, results in severance of employment with the seller and employment by the buyer for all individuals affected by the sale. If a large enough group of employees have a severance of employment, full vesting in the seller's plan may be required for all affected employees due to the "partial plan termination" rules. Also, the buyer and seller must not be part of a related group of entities. A *stock sale*, on the other hand involves the acquisition of the seller's common stock so that the buyer becomes the owner of the corporation, including all assets and liabilities, and all employment contracts or arrangements.

### Retirement Plan Impact

At least two retirement plan issues need to be addressed **before** an acquisition/disposition occurs. If an *asset sale* occurs, the acquisition results in termination of employment, which triggers the right to an immediate distribution in the majority of retirement plans. Usually the seller terminates the plan if all employees leave their employment, resulting in the distribution of all plan assets. However, if the buyer does not wish employees to become immediately entitled to retirement benefits upon the asset acquisition, the buyer must either agree to continue the prior plan or merge the plan into the buyer's plan effective **on or before the date of the sale**. If a *stock sale* occurs when the seller has a 401(k) plan and the buyer sponsors a defined contribution plan, it may be necessary

or desirable to terminate the 401(k) plan **before** the acquisition takes place. This is because tax law prohibits distributing benefits due to the termination of a 401(k) plan if the employer (determined at the time of the plan termination) maintains another defined contribution retirement plan during the period between the plan termination and 12 months after plan assets have been distributed. If the buyer terminates the plan after the acquisition, the existence of another defined contribution plan will complicate the transaction. This means that if the buyer wants its new employees to participate in its defined contribution plan, but does not wish to merge the seller's 401(k) plan into the buyer's plan, either:

Employees must wait at least 12 months after assets are distributed before entering the buyer's plan

**Or**

The prior plan must be frozen so that no distributions are made before termination of employment, death, disability or retirement.

### **Other Retirement Plan Provisions Affected**

#### *Plan Eligibility and Vesting Provisions*

Buyers in an *asset sale* are not required to recognize an employee's previous employment with the seller for either plan eligibility or vesting, but may do so voluntarily by a suitable plan amendment. Employees do not terminate employment when a *stock sale* occurs, so there is no interruption of their continuous service for retirement plan purposes.

#### *Plan Coverage Testing [IRC 410(b)]*

The Internal Revenue Code ("IRC") provides a special rule permitting employers testing a plan for minimum coverage compliance to generally ignore certain employees during a "transition period" if they are employed as part of a business acquisition. The transition period is defined to begin on the acquisition date and to end on the last day of the first *full* plan year following the acquisition date. For example, suppose **Employer A** acquired **Employer B's** employees through an acquisition that occurred on March 24, 2016 and **Employer A** has a calendar year tax qualified retirement plan. **Employer A** can ignore employees who worked for **Employer B** when demonstrating compliance with IRC 410(b) minimum coverage requirements for both the 2016 and 2017 plan years. Starting in 2018, **Employer A** must include the former **Employer B** employees when determining minimum coverage compliance and may find it necessary to cover all or some of them in **Employer A's** retirement plan.

#### *Blackout Notice*

If, as a result of the business combination, one of the qualified plans realigns or changes its investments, an investment "blackout period" could occur. A blackout is a period of more than three consecutive business days during which the plan participants' right to change investments, request a loan, or distribution is curtailed. Federal law requires that the participant receive a 30 day advance notice of such a blackout, its reason, and its likely duration. The Department of Labor has provided a model "blackout"

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notice. Penalties apply for a delinquent notice.

### Participant Plan Loans after an Acquisition

If the seller's retirement plan has outstanding participant loans at the time of a disposition of assets and associated employees, it is sometimes possible to avoid the loans becoming immediately due and payable. This action is generally well received by employees who otherwise have to pay income tax on any unpaid loans. The problem is avoided by transferring outstanding loans from the seller's plan to the buyer's plan. It may be necessary to amend either or both plans in order to accomplish this transaction.

### **ANNUAL PARTICIPANT 404A-5 NOTICES MAY BE DUE SOON**

Employers who have retirement plans featuring participant investment direction of allocated plan contributions are required to provide an annual disclosure notice according to Department of Labor Regulation 2550.404a-5 ["404a-5 Notice"]. The report is required once in any 12 month period, although the Employee Benefits Security Administration says this requirement is currently satisfied if annual disclosures are made within 14 months of the prior year's disclosure.

In addition, certain information must be provided to participants quarterly. Also, new plans must provide the 404a-5 Notice on or before the date that participants are expected to first direct plan investments. NRS clients can obtain more information about this participant disclosure from their investment advisors or from their NRS Account Manager.

### **AUGUST 2015 REMINDERS**

**August 17** - Retirement plan employer contributions are due if contributions are claimed as deductions on tax returns due August 17, including returns on extension.

**August 17** - Forms 5500 series and Form 8955-SSA are due for Plan Years ending October 31, 2014 if they are on extension.

**August 31** - Forms 5500 series and Form 8955-SSA are due for Plan Years ending January 31, 2015 unless an extension applies.

### **HOW ARE WE DOING? PLEASE COMPLETE THE NRS CLIENT SATISFACTION SURVEY!**

We are grateful and thankful for the strong response to our Client Satisfaction Survey! In an effort to maintain high level client satisfaction, we need client feedback! The content of these replies will be sent directly to Executive Management. This survey takes less than 2 minutes to complete. To access the Client Satisfaction Survey, [please click here.](#)

As always, NRS truly values your continued business!

**FOR MORE INFORMATION OR TO REQUEST A PROPOSAL, PLEASE VISIT  
OUR WEBSITE AT [WWW.NRSERVICES.COM](http://WWW.NRSERVICES.COM), OR FOR SALES SUPPORT,  
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